CSG Systems International (India) Pvt Ltd Vs Commissioner Of Central Tax, Bengaluru South Commissionerate

Court: Customs, Excise And Service Tax Appellate Bangalore

Date of Decision: March 29, 2021

Acts Referred: Cenvat Credit Rules 2004 â€" Rule 5
Place Of Provision Of Service Rules, 2012 â€" Rule 2(f), 3, 9
Service Tax Rules, 1994 â€" Rule 6A
Export of Services Rules, 2005 â€" Rule 3(1)(iii), 5

Hon'ble Judges: S.S. Garg, J

Bench: Single Bench

Advocate: Harish Bindumadhavan, C.V. Savitha

Final Decision: Allowed

Judgement

1. The present appeal is directed against the impugned order dt. 03/03/2020 passed by the Commissioner (Appeals) whereby the Commissioner

(Appeals) has upheld the Order-in-Original and dismissed the appeal of the appellant.

2. Briefly, the facts of the present case are that the appellant are registered under service tax for providing taxable services falling under the

categories of commercial training and coaching, Manpower recruitment agency service and information technology software service and Business

Auxilliary service. Appellant filed a refund claim on 26/07/2018 for Rs.8,47,354/- consequent to passing of Order-in-Appeal No.676/2018 dt.

27/06/2018 by the Commissioner of Central Tax (Appeals-I), Bangalore for refund of unutilized CENVAT credit of service tax availed on the input

services used for providing output services said to have been exported during the period January 2013 to March 2013 in terms of provisions of Rule 5

of CENVAT Credit Rules, 2004. The claim was supported with the copy of Order-in-Appeal No.676/2018 dt. 27/06/2018 passed by the

Commissioner of Central Tax (Appeals-I), Bangalore. It is pertinent to note that initially the claim was filed by the assessee for the period January

2013 to March 2013 for an amount of Rs.39,77,799/- and the claim was further revised for Rs.38,39,074/-. That vide Order-in-Original No.231/2017

dt. 16/01/2018, the original adjudicating authority had sanctioned Rs.29,91,720/- out of Rs.38,39,074/-. The amount of Rs.8,47,354/- was rejected on

the ground that the claimant has declared export turnover for the relevant period for Rs.22,17,32,119/- which includes ITSS and BAS but under Rule 3

of the Provision of Service Rules, 2012, the sales, marketing and administrative services classified as BAS are provided in India and the same cannot

be treated as export of service. Hence considering realisation of amounts towards ITSS only as export turnover, refund was calculated. Further in the

said order, an amount of Rs.33,617/- credit availed on canteen related services and copies of invoices not produced was also rejected. Aggrieved by

the said Order-in-Original, appellant filed appeal before the Commissioner (Appeals) and the Commissioner (Appeals) vide Order-in-Appeal dt.

27/06/2018 set aside the Order-in-Original to the limited extent of the refund rejected, by way of remand to the original adjudicating authority for fresh

adjudication taking due note and cognizance of the discussions on specific issues mentioned by the Commissioner in the order itself. Consequent to

passing of the said Order-in-Appeal, the appellant filed refund claim on the partially rejected amount of Rs.8,47,354/- as per the direction given by the

Commissioner(Appeals). After following the due process, the adjudicating authority vide Order-in-Original dt. 21/12/2018 has rejected the claim on the

ground that the BAS provided by the appellant to its group companies outside India would be considered as Ã¢â‚¬Ëœ Intermediary ServicesÃ¢â‚¬â„¢ and cannot

be treated as export of services. Aggrieved by the said order, appellant filed appeal before the Commissioner(Appeals) who rejected the appeal.

hence the present appeal.

3. Heard both sides and perused the records.

4.1. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly

appreciating the facts and the law. He further submitted that the first Order-in-Original dt. 16/01/2018 and remand Order-in-Appeal dt. 27/06/2018

and the impugned order have all travelled beyond the show-cause notice which is not permitted by law as settled by the HonÃ¢â‚¬â„¢ble Supreme Court in

the following decisions:-

a. CCE & Cus., Surat Vs. Sun Pharmaceuticals Inds. Ltd. [2015(326) ELT 3 (SC)]

b. Caprihans India Ltd. Vs. CCE [2015(325) ELT 632 (SC)]

c. CC, Mumbai Vs. Toyo Engineering India Ltd. [2006(201) ELT 513 (SC)]

He further submitted that the show-cause notice is the foundation of any demand as settled in the case of CCE, Bangalore Vs. Brindavan Beverages

(P) Ltd. [2007(213) ELT 487 (SC)] and therefore to divert from the allegations made in the show-cause notice and confirm demands on new grounds

is wholly incorrect. He further submitted that the remand Order-in-original and the impugned order has been passed in complete ignorance of the

Order-in-Appeal dt. 27/06/2018, which is against the principle that orders passed by higher authorities are binding on lower authorities, as settled in the

case of UOI Vs. Kamlakshi Finance Corporation Ltd. 1991(55) ELT 433 (SC)]. He further submitted that only on these grounds, the impugned order

is liable to be set aside without going into merits of the case. But still, the learned counsel submitted that on merits also, the appellant has a good case.

4.2. On merits, the learned counsel submitted that the appellants are providing ITSS and BAS as services to group companies located outside India

and these services provided to group companies located outside India are treated as export of service. The place of provision for these services is the

place of recipient i.e. group companies located outside India. He further submitted that the services are provided on principal to principal basis and

there is no element of principal-agent relationship. It is not a tripartite arrangement granting rights of claim by each of the three parties Ã¢â‚¬" service

provider, beneficiary of service and the intermediary/agency/broker. The agreement is only an arrangement between only two parties, appellant and

CSG Group company. Such service involves creating awareness in the Indian market and promoting the software products and services of the CSG

group companies. He further submitted that once a potential customer is identified, CSG group is responsible for negotiating the price, terms of

contract, timeframe and scope of services. The appellant does not represent CSG group companies in signing and executing the contract. Further the

agreement clearly and specifically states that appellant shall not be construed as an agent capable of binding CSG group companies by its actions.

Further the appellant is not responsible for further risk and rewards and responsibility towards the provision and quality of services provided to

customers. He also submitted that the learned Commissioner has selectively picked up some clauses from the agreement without analyzing the

agreement as a whole but read clauses in isolation which is against the law as held by the Supreme Court in the case of Super Poly Fabriks Ltd.

[CCE, Punjab [2008(10) STR 545 (SC)]. He further submitted that in the present case, as per the agreement between the appellant and its foreign

entity, appellant is compensated for its efforts in the marketing support activity under a cost plus mark-up model of fees and not under a success fee

or sales commission model. Further fees of the appellant is not contingent upon fructified sales, as against a typical arrangement of broker /

commission agent / intermediary whose revenue is contingent upon the success of marketing activity. He further submitted that mere rendering of

marketing and sales support services on principal to principal basis such as customer identification, market analysis and coordination with the

customers for meeting with CSG group etc. cannot be construed as arranging provision of intermediary services as contemplated in clause 2(f) of the

POPS Rules read with Rule 9 of the said Rules. For this submission, he relied upon the decision in the case of CCE&ST, Bangalore Vs. Analog

Devices India pvt. Ltd. [2017(12) TMI 830 Ã¢â‚¬" CESTAT Bangalore] wherein it has been held that appellant are not rendering the intermediary

service and they are rendering consulting engineer services and BAS and fall in definition of export. He also submitted that the services provided by

the appellant to the foreign parent company would classify as export of service under the provision of Rule 6A of the Service Tax Rules, 1994 if all

the six conditions under the said Rule are met and in the present case, the appellant satisfy all the six conditions and hence services rendered by the

appellant are export of service. Appellant also relied upon the decision in the case of AMD India Pvt. Ltd. Vs. CST, Bangalore [2017(12) TMI 772

Ã¢â‚¬" CESTAT Bangalore] wherein it has been held that the ITSS, ITES provided by the assessee does not fall under intermediary services and thus

fall within the definition of export of services.

5. On the other hand, the learned AR reiterated the findings of the impugned order.

6. After considering the submissions of both the parties and perusal of the material on record, I find that when the show-cause notice dt. 28/03/2014

was issued when the appellant filed the refund claim and the grounds raised in the show-cause notice was lack of nexus, claim is time barred and lack

of documentation or discrepancies in documents; whereas when the Order-in-Original dt. 16/01/2018 was passed, the original authority travelled

beyond the show-cause notice and came to a finding that the sales, marketing and administrative services are classified as BAS provided in India and

hence Rule 6A not fulfilled and the appellant is acting as an intermediary. When the appeal filed against the said order, Commissioner(Appeals)

remanded the matter and directed the original authority to reconsider the matter in the light of his earlier Order-inAppeal No.728 to 730/2017 dt.

13/07/2017. But unfortunately on remand, the original authority vide Order-in-Original dt. 21/12/2018 did not consider the directions of the appellate

authority and again came to the conclusion that the BAS provided by the appellant to its group companies outside India would be considered as

intermediary services and cannot be treated as export of service. The appellant again filed an appeal against the said order and vide the impugned

order Commissioner(Appeals) has rejected the appeal and upheld the order of the original authority holding that the BAS are intermediary services.

Further after analyzing the show-cause notice and the various orders, I find that the first Order-in-Original, remand Order-inOriginal and the impugned

order, all have travelled beyond the show-cause notice because in the show-cause notice, there is no allegation regarding the intermediary service

which has been upheld by both the authorities by ignoring the earlier direction of the remand order passed by the Commissioner(Appeals). The learned

counsel cited the decision of the HonÃ¢â‚¬â„¢ble Supreme Court in the case of Brindavan Beverages (P) Ltd. and other decisions, wherein it has been

consistently held that the show-cause notice is the foundation of any demand and any order passed beyond the show-cause notice is not legally

permissible and only on this ground, the impugned order can be set aside and I hold that the impugned order is beyond the show-cause notice and

therefore bad in law. Further as far as merit is concerned, even the appellant has proved by referring to Master Service Agreement that the sales

marketing and support services provided to its group companies are export of service because the said services have been provided on principal to

principal basis and there is no element of principal-agent relationship. Further, I find that the Commissioner(Appeals) has selectively picked up the

clauses in the Master Agreement without analyzing the agreement as a whole which is also bad in law as held by the Supreme Court in the case of

Super Poly Fabriks Ltd. cited supra. Further I find that the appellant has satisfied all the six conditions of Rule 6A which proves that these services

rendered by them are export of service. Further I find that in the case of AMD India Pvt. Ltd. cited supra, the Tribunal in para 6.1 has held as under:-

6.1. After considering the submissions of both the parties and perusal of material on record and the judgments relied upon by the appellant,

I find that the appellant is a subsidiary of its holding company and is providing services under the Master Services Agreement and the same

Master Services Agreement does not provide that the appellant will facilitate or will arrange the purchase and sale on behalf of the AMD

entities outside India. Further I also find that the services rendered by the appellant do not fall under the definition of intermediary and it

satisfies all the conditions prescribed under rule 6A of the Service Tax Rules, 1994 because the services recipient is located outside India

and the place of provision of service is outside India and the consideration has also been received in convertible foreign exchange. Further

I find that the appellantÃ¢â‚¬â„¢s potential customers for the products of the foreign company are located abroad. Though the services are

provided with respect to buyer in India, the benefit of the same accrued to the company abroad. Further the case laws relied upon by the

appellant are applicable in the facts and circumstances of the case. Further I find that in the case of Lenovo India Pvt. Ltd. (supra), this

Tribunal has held that promoting sale of goods of foreign client in India being BAS fulfills the conditions under Export of Service Rules,

2005 and qualifies as export of service. Similarly in the case of KSH International Pvt. Ltd. (supra), the Tribunal held as under:-

The denial of refund of service tax to the appellant under Rule 5 ibid is contrary to the express provisions of law as clarified in CBEC

Circular No.111/5/2009-ST dt. 24/02/2009. The Board, in respect of business auxiliary services falling under Rule 3(1)(iii) of the Export of

Services Rules, 2005, clarified thus; the phrase Ã¢â‚¬Ëœused outside IndiaÃ¢â‚¬â„¢ is to be interpreted to mean that the benefit of the service should

accrue outside India. Thus, it is possible that export of service may take place even when all the relevant activities take place in India so

long as the benefits of these services accrue outside India.

7. In view of my discussion above, I am of the considered view that the impugned order is bad in law as it has travelled beyond the show-cause notice

and also on merit, the services rendered by the appellant fall in the definition of Ã¢â‚¬ËœExport of ServiceÃ¢â‚¬â„¢ and the appellant is entitled to refund of the

said amount. Accordingly, appeal is allowed in above terms, with consequential relief if any.

(Order was pronounced in Open Court on 29/03/2021)