

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 50411 of 2017

(Arising out of Order-in-Original No. ALW-EXCUS-OIO-COM-65/16-17 dated 01.12.2016 passed by the Commissioner of Central Excise & Service Tax, Alwar)

M/s Kusum Healthcare Pvt. Ltd. Appellant

SP-289a, 825 RIICO Industrial Area
Chopanki, Bhiwadi
Rajasthan

VERSUS

Commissioner of Central Excise & Service TaxRespondent

„A“ Block, Surya Nagar, Old Delhi Road
Alwar

APPEARANCE:

Shri B.L. Narasimhan and Shri Kunal Aggarwal, Advocates for the Appellant
Shri Harshwardhan, Authorised Representative of the Department

**CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R PRIYA, MEMBER (TECHNICAL)**

FINAL ORDER NO. 50250/2023

DATE OF HEARING : February 14, 2023
DATE OF ORDER : March 02, 2023

JUSTICE DILIP GUPTA :

This appeal has been filed by M/s Kusum Healthcare Pvt. Ltd.¹ to assail the order dated December 01, 2016 passed by the Commissioner of Central Excise & Service Tax, Alwar², by which the demand of service tax of Rs. 4,58,38,070/- has been confirmed with interest and penalty pursuant to the issuance of a show cause notice dated April 18, 2016 to the appellant for the period from September 2014 to September 2015.

¹ the appellant

² the Commissioner

2. The issue involved in the appeal relates to demand of service tax on reverse charge basis in respect of expenses incurred in foreign currency on business promotion and other activities.

3. The appellant is a manufacturer-exporter of pharmaceutical products and is a 100% Export Oriented Units. It established representative offices in many countries to promote its goods and to liaison with the local authorities in such countries. According to the appellant, these representative offices do not have any independent revenue or clients and the purchase orders are entered with the clients directly by the appellant and so the representative offices do not enter into any contract with the clients. The payment for goods supplied to the customers is received by the appellant and all the expenses incurred in the supply of goods are claimed as expenses in India. The salaries of the employees working at the representative offices are also remitted by the appellant. The appellant also reimburses other expenses incurred by the representative offices for its operations. These expenses are in the nature of rent, security, electricity etc.

4. The department entertained a view that the expenses incurred by the appellant are liable to service tax on reverse charge basis. Earlier also, show cause notices were issued to the appellant and they were adjudicated upon. A summary of the proceedings is as follows:

S. No.	Date of show cause notice	Relevant Period	Service Tax Appeal Number
1.	13.10.2011	April 2006 to Mar 2011	ST/57891/2013 (April 2006 to March 2011) and ST/51216/2014 (April 2011 to June 2012) were disposed of by an order dated 12.01.2018. The Tribunal –

2.	03.12.2012	April 2011 to Dec 2011	a) set aside the demand under Business Auxiliary services; b) Upheld the demand under Advertisement services, but restricted the demand to normal period of limitation.
3.	18.04.2013	Jan 2012 to June 2012	
4.	25.4.2014	July 2012 to Nov 2013	By order dated 13.6.2018, the Tribunal set aside the demand of service tax under Business Auxiliary services in Service Tax Appeal No. 52357 of 2015.
5.	15.10.2015	Dec 2013 to Aug 2014	By order dated 1.10.2021, the Tribunal set aside the demand of service tax under Business Auxiliary services in Service Tax Appeal No. 53015 of 2016.

5. In continuation of the above proceedings, the department sought details from the appellant of the expenses incurred by it on foreign based service providers during the period from September 2014 to September 2015. The appellant supplied the information, but the Department issued a show cause notice dated 18.04.2016 by proposing to demand service tax on the entire value of foreign expenses incurred by the appellant. It was alleged that the appellant made payments in foreign currency to its representative offices in countries other than India and such expenses were towards business promotions, marketing and consultancy activity and were taxable in India. The appellant filed a reply to the show cause notice, but the Commissioner by order dated December 01, 2016 confirmed the demand of service tax of Rs. 4,58,38,070/- holding that the services were received by the appellant from its representative offices located abroad, as also from the independent service providers located abroad, and the said services were received in India in terms of rule 3 of the Taxation of Services (Provided

from Outside India and Received in India) Rules, 2006³ read with the erstwhile section 66A of the Finance Act, 1994⁴. The order also appropriates an amount of Rs. 1,25,20,769/- deposited by the appellant

6. Shri B.L. Narasimhan, learned counsel for the appellant assisted by Shri Kunal Aggarwal made the following submissions :

- (i) The impugned order has been passed based on obsolete provisions of law;
- (ii) The impugned order has recorded findings on submissions never made by the appellant and no findings have been given on the submissions made;
- (iii) The issue involved in the instant appeal has been decided in favour of the appellant by the Tribunal in the appellant's own case;
- (iv) The service tax demand of Rs. 25,75,99,285/- under heading „business promotion expenses“ is liable to be set aside;
- (v) The service tax demand on „advertisement expenses“ of Rs. 2,60,90,008/- is liable to be set aside; and
- (vi) Interest and penalties are not imposable on the appellant.

7. Shri Harshwardhan, learned authorized representative appearing for the Department, however, supported the impugned order.

8. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the Department have been considered.

3 the 2006 Rules

4 the Finance Act

ORDER IS BASED ON OBSOLETE PROVISIONS

9. The first submission advanced by the learned counsel for the appellant that the impugned order has been passed on obsolete provisions of law which are not applicable for the relevant period deserves to be accepted. Though the show cause notice dated 18.4.2016 invoked provisions of law which were applicable during the relevant period, but the impugned order held that Business Auxiliary/Business Support/Advertisement Agency/Business Consultant services received by the appellant were liable to service tax as per the provisions of the erstwhile section 66A of the Finance Act, read with rule 3 of the 2006 Rules. The relevant findings are reproduced below :

"18. On going through the above legal provisions, it is evident that Business Auxiliary Services/Business Support Services/Management or Business Consultant Services /Advertising Agency's Service are covered under sub-rule (iii) of Rule (3) of Services (Provided from outside India and received in India) Rules, Therefore the said services are liable to service tax as per provisions of Section 66A of Finance Act, 1994. In the present case the noticee have received Business Auxiliary Services/Business Support Services/Management or Business Consultant Services/Advertising Agency"s Service directly from the foreign service provider. It is definitely not a case where the services were provided from outside India and also consumed outside India as the objective of the services was to procure orders in overseas market and advertise the product in overseas market benefit of which was to directly go the noticee company in India. The noticee were also engaged in carrying business through their representative office situated in a country other than India, therefore the said foreign representative offices have separate identity/entity for the purpose of section 66A of the Finance Act, 1944 as per explanation 1 of said Section 66A. In both the situation the noticee are liable to pay service tax in view of the provisions of Section 66A of the Finance Act, 1994 read with rule 3 of Taxation of services provided from outside India and received in India and rule 2(1)(d)(iv) of the Service Tax Rules, 1994."

19. The relevant period is September 2014 to September 2015, which is clearly after the introduction of the negative list regime. Thus, the provisions envisaged under negative list regime would be applicable, but the impugned order is passed based on the provisions of law applicable prior to July 01, 2012. The demand would, therefore, have to be set aside in view of the decision of the Karnataka High Court in **CST, Bangalore vs The Peoples Choice**⁵.

ISSUE DECIDED

10. This apart, the issue involved in this appeal has also been decided in favour of the appellant in the appellant's own case. On an identical issue, for period 2006-07 to June 2012, the Tribunal decided the issue in favour of the appellant by order dated January 12, 2018 passed in Service Tax Appeal No. 57891 of 2013 and Service Tax Appeal No. 51216 of 2014. For the period July 2012 to November 2013 also, the Tribunal decided the issue in favour of the appellant by order dated June 13, 2018 passed in Service Tax Appeal No. 52357 of 2015. For the period December 2013 to August 2014, the Tribunal decided the issue in favour of the appellant by order dated October 01, 2021 passed in Service Tax Appeal No. 53015 of 2016.

11. In **M/s Kusum Healthcare Pvt. Ltd. vs CCE, Jaipur**⁶ which relates to the period from April 2006 to June 2012, the Tribunal held as follows :

"6. We find that the Revenue has taken a stand that since as per the proviso, a branch office located outside India shall be treated as a separate business establishment, the services rendered by such establishment should be treated for tax liability. In this

5 2014-TIOL-431-HC-KAR-ST

6 S.T. Appeal No. 57891/2013 & S.T. Appeal No. 51216/2014 decided on January 12, 2018

connection, we note, similar dispute came before the Tribunal for tax liability under the very same tax entry in **Torrent Pharmaceutical Ltd.** - 2015 (39) S.T.R. 97 (Tri.-Ahmd.). The issue of the expenditure incurred by the appellant with reference to the branch office located abroad, which was involved in activities, which may fall under business auxiliary service was considered by the Tribunal.

12. In **M/s Kusum Healthcare Pvt. Ltd. vs CCE, Alwar**⁷ which relates to the period from July 2012 to November 2013, the Tribunal relied upon the aforesaid decision of the Tribunal and held as follows :

10. We note that the identical issue in respect of the appellant for the period prior to 01.07.2012 was considered and decided by the Tribunal in the Final Order No. 50314-50315/2018 dated 12.01.2018. On a perusal of the said order, we find that the Tribunal has considered the issue with reference to the provisions of Section 66A (2) read with the Explanation I, which was on the statute book prior to 01.07.2012.....”

13. In **M/s Kusum Healthcare Pvt. Ltd. vs CCE & ST, Alwar**⁸ which relates to the period from December, 2013 to August, 2014, the Tribunal held as follows :

“7. In the present dispute too, it is the admitted flow of funds for maintenance and upkeep of the branch offices that has been presumed to be the quid pro quo for rendering of „taxable service“ by the branch to the principal office. That the remittances were made for meeting the establishment costs at the location of the branches is not disputed.

11. Consequently, the conclusion in Milind Kulkarni, ST/53015/2016 that was relied upon in Kusum Healthcare Ltd to set aside the demand after introduction of „negative list“ regime is similarly applicable to the dispute now impugned before us.

12. In these circumstances, the impugned order, being contrary to law, is liable to be set aside. We do so to allow the appeal.”

⁷ Service Tax Appeal No. 52357/2015 decided on June 13, 2018

⁸ Service Tax Appeal No. 53015/2016 decided on October 01, 2021

14. Thus, as the issue involved has been decided in favour of the appellant in the own case of the appellant for pre-negative list and post-negative list, the demand deserves to be set aside.

BUSINESS PROMOTION EXPENSES

15. The appellant claims that it made foreign currency expenditure of Rs. 25,75,99,285/- on account of business promotion activities during the relevant period from September 2014 to September 2015. The Department has treated the said amount as „taxable value“ and raised a demand of service tax on the amount of Rs. 25,75,99,285/.

The break-up of this amount is as follows :

S. No.	Description of Expenses	Amount
1	Catalogues	2,59,75,847
2	Leaflets	80,945
3	Souvenir Products	5,00,517
4	Calendar	4,81,826
5	Tear Sheet	1,51,073
6	Polythene Bag	47,410
7	Miscellaneous Items	68,005
8	Vouchers/Coupons for purchase of materials	21,70,15,023
9	Insurance Charges	21,784
10	Space Charges	6,95,591
11	Electricity Charges for CPHI	1,21,577
12	Stand Cleaning/Designing/Installation	12,72,624
13	Foreign Trip Sponsorship Charges	1,11,67,064
Total		25,75,99,285

16. The appellant claims that the aforesaid amount was paid directly by the appellant and such invoices were also addressed to the appellant and not to the representative offices. The appellant further

claims that :

- (a) The items mentioned at **Serial Nos. 1 to 7** of the table are payment made for purchase of goods, which were purchased and have been distributed to the Pharmacists as part of the business promotions. Thus, there is no service tax liability in transactions involving transfer of property in goods in terms of section 65B (44) of the Finance Act.
- (b) The items mentioned at **Serial Nos. 9 to 12** are towards expenses incurred by the appellant at the site where CPHI Worldwide Exhibition of 2014 was held at Paris and a copy of agreement and invoices have also been enclosed. Thus, as all these expenses were incurred in relation to the said event, the place of provision would be the location at which the event takes place i.e. Paris in terms of rule 6 of Place of Provisions of Services Rules, 2012⁹, which is outside the taxable territory. Consequently, there can be no liability on the appellant to pay service tax.
- (c) The item mentioned at **Serial No. 13** is towards organization of tour by a foreign entity called Wilsona Commerce Corp for eligible pharmacists under the promotional activities to travel to Paris and other destinations and copy of the agreement with Wilsona Commerce Corp has also been enclosed. According to the appellant, since the individual pharmacists received the benefit of services rendered by the foreign tour organizer the services were provided outside India in terms of rule 4(b) of the 2012 Rules and consequently have been provided and received outside the taxable territory. Thus, the expenses mentioned at Serial No. 13 cannot be subjected to the levy of service tax.
- (d) The item mentioned at **Serial No. 8** pertains to purchase of coupons. It would be out of the purview of the definition of service under section 65B (44) of the Finance Act, being in relation to purchase of goods.

17. The aforesaid submissions advanced by the learned counsel for the appellant deserve to be accepted. The said amount was directly paid by the appellant and even the invoices were raised upon the appellant and not the representative offices.

ADVERTISEMENT EXPENSES

18. The appellant has stated that the amount of Rs. 2,60,90,008/- under Advertisement expenses pertains to the following expenses –

S. No.	Description of Expenses	Amount	Service Tax Already Paid
1	Expenses for Non-Print Media Advertisements	2,53,42,307	31,41,507
2	Expenses for Print-Media Advertisements	7,47,701/-	NIL
Total		2,60,90,008/-	31,41,507

19. According to the appellant, both prior and post the amendment of clause (g) of section 66D of the Finance Act, sale of slots in advertisement in print media did not attract service tax liability. The appellant had discharged service tax liability on expenses for non-print media advertisements. The services of advertisement in respect of print-media is exempted in terms of the negative list of services under section 66D(g) of the Finance Act. Thus, the appellant is not liable to pay service tax on the service of advertisement in print-media.

20. In view of the aforesaid discussion, it is not possible to sustain the order dated December 01, 2016 passed by the Commissioner. It is, accordingly, set aside and the appeal is allowed.

(Pronounced in the open court on 02.03.2023)

**(JUSTICE DILIP GUPTA)
PRESIDENT**

**(HEMAMBIKA R PRIYA)
MEMBER (TECHNICAL)**

Golay



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