CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD.

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 70457 of 2020

(Arising out of order in appeal No. NOI-EXCUS-001-APP-1388 & 1389-19-20 dated 05.02.2020 passed by the Commissioner (Appeals), Central Goods and Service Tax, Noida).

M/s CHF Industries India (P) Ltd., **Appellant**
G-4, 2nd Floor, Sector-6, Noida-201 301.

VERSUS

Commissioner, Central Goods and Service Tax **Respondent**
C-56/42, Sector-62, Noida.

AND

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APPEARANCE:

Shri Nishant Mishra, Advocate for the appellants
Shri Anupam Kumar Tiwari, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER Nos. 70238-70239/2021

DATE OF HEARING: 06.08.2021
DATE OF DECISION: 08.10.2021

ANIL CHOUDHARY:

The Appellant is challenging the common Order-in-Appeal No. NOI-EXCUS-001-AAP-1388 & 1389-19-20 dated 5.2.2020 passed by the Ld. Commissioner (Appeals). The period involved in these two appeals are Oct"15 to March"16 and April"16 to Sep"16.

2. The issue involved is whether the services provided by the appellant to its parent company in Hong Kong, can be treated as export of services, and if the answer is in affirmative, whether the refund of amount paid under mistake of law by treating such export of services, as taxable service, can be denied by the revenue.

3. Brief facts of the case are that the appellant (M/s CHF Industries India (P) Ltd.) is a wholly owned subsidiary of M/s CHF International Limited, Hong Kong. The appellant is incorporated under the Companies Act, 2013, and is having service tax registration.

4. During the period October, 2015 to March, 2016 and April, 2016 to September, 2016, the appellant provided services in the nature of „assistance in procurement of goods" by the parent company in Hong Kong, directly from third parties in India. The nature of services included-keeping track of consignment, quality checks and timely dispatch by third parties to designated places of the parent company, outside India. For the services so provided, the appellant raised invoice for reimbursement of expenses, without charging any service tax and payment for the same was received by the appellant in convertible foreign exchange.

5. On the basis of some wrong legal advice that the services provided by the appellant to its parent company in Hong Kong are taxable services of "Management or Business Consultancy Services", the appellant erroneously paid service tax of Rs. 12,84,404/- for the period October, 2015 to March, 2016 and Rs. 9,82,965/- for the period April, 2016 to September, 2016. Subsequently on realizing the mistake, the appellant filed revised returns for both the periods and the entire amount received in convertible foreign exchange was claimed exempt, against „export of services".

6. On 09.03.2017, the appellant filed separate refund claims for refund of Rs. 12,84,404/- & Rs. 9,82,965/- for both the periods whereupon separate two Show Cause Notices dated 26.6.2018, (for the two periods) were issued to the appellant to show cause as to why not the refund claims be rejected, as the appellant has provided services of „intermediary or agent" to its foreign client, which are covered under Rule 9 of „Place of Provision of Services Rules, 2012" and hence the services provided by the appellant are not export of services. The two show cause notices dated 26.06.2018 were adjudicated by Assistant Commissioner vide separate Order-in-Original No. 155/R/AC/CGST/D-I/2018-19 dated 11.12.2018 and Order-in-Original No. 154/R/AC/CGST/D-I/2018-19 dated 11.12.2018, rejecting the refund claims of Rs. 12,84,404/- & Rs.9,82,965/- respectively, on the ground that clause (d) & (f) of Rule 6A(1) of Service Tax Rules, 1994, are not fulfilled i.e. place of provision of service is not outside India, and the provider of service

and recipient of service are establishments of same person, under Explanation 3(b) of clause (44) of Section 65B of the Act.

7. Aggrieved with the two adjudication orders, the appellant preferred two separate appeals before the Ld. Commissioner (Appeals), which have been dismissed by the impugned common Order-in-Appeal, on the following grounds:-

A) In terms of explanation 3(b) of clause (44) of Section 65B and Para 10.2.2 of Taxation of Services - „An Education Guide", the appellant and its parent company in Hong Kong are merely establishments of a distinct person and hence condition stipulated under clause (f) of Rule 6A(1) of Service Tax Rules, 1994 is not satisfied;

B) In view of definition of „intermediary" under Rule 2(f) of Place of Provision of Services Rules, 2012, the services provided by the appellant to its parent company in Hong Kong are „intermediary services", the place of provision of services shall be the location of service provider i.e. in India, and consequently, condition stipulated under clause (d) of Rule 6A(1) of Service Tax Rules, 1994 is also not satisfied.

8. Learned Counsel for the appellant urges –Rule 6A (1) of Service Tax Rules, 1994 provides as under:-

6A. Export of Services

(1) The provision of any service provided or agreed to be provided shall be treated as export of service when, -

(a) the provider of service is located in the taxable territory,

(b) the recipient of service is located outside India,

(c) the service is not a service specified under Section 66D of the Act,

(d) the place of provision of service is outside India,

(e) the payment of such service has been received by the provider of service in convertible foreign exchange, and

(f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of Section 65B of the Act.

Admittedly, there is no dispute in the present case regarding condition no. (a), (b), (c) & (e), inasmuch as the provider of service i.e. the appellant is located in taxable territory (India), the recipient of service i.e. parent company is located outside India (Hong Kong), the service provided is not specified under Section 66D and the payment of such service has been received in convertible foreign exchange. Thus, the only dispute is regarding clause (d) & (f) of Rule 6A(1).

9. **Condition specified in clause (f) satisfied in the present case :**

Explanation 3 (b) of clause (44) of Section 65Bis reproduced hereunder:-

> ***65B. Interpretations***
>
> *(44) .....*
>
> *Explanation 3 (b) - an establishment of a person in the taxable territory and any of this other establishment in non-taxable territory shall be treated as establishments of distinct persons.*

Explanation 3(b) treats establishment of one person in taxable territory and his other establishment in a non-taxable territory, as establishment of distinct persons.

However, in the present case, the appellant as well as its parent company in Hong Kong are separate legal entities and therefore they cannot be treated as „same person“. Merely because the parent company in Hong Kong is a holding company of the appellant, the same does not means that the appellant and its parent company are same „person“. Reliance in this is placed on Apex Court judgment in the case of ***Vodafone***

International Holdings BV v. Union of India *(2012) 6 SCC 613*, wherein it has been held:-

> "*72. The approach of both the corporate and tax laws, particularly in the matter of corporate taxation, generally is founded on the abovementioned separate entity principle i.e. treat a company as a separate person. The Income Tax Act, 1961, in the matter of corporate taxation, is founded on the principle of the independence of companies and other entities subject to income tax. Companies and other entities are viewed as economic entities with legal independence vis-à-vis their shareholders/participants. It is fairly well accepted that a subsidiary and its parent are totally distinct taxpayers. Consequently, the entities subject to income tax are taxed on profits derived by them on stand-alone basis, irrespective of their actual degree of economic independence and regardless of whether profits are reserved or distributed to the shareholders/participants. Furthermore, shareholders/ participants that are subject to (personal or corporate) income tax, are generally taxed on profits derived in consideration of their shareholding/participations, such as capital gains. Nowadays, it is fairly well settled that for tax treaty purposes a subsidiary and its parent are also totally separate and distinct taxpayers*." (emphasis supplied)

Similar issue has been decided by Hon"ble Gujarat High Court in **Linde Engineering India Pvt. Ltd. v. Union of India 2020-TIOL-1285-HC-AHM-ST** has considered the explanation 3(b) and has held that services provided by a company in India to its 100% holding company abroad, cannot be considered as establishments of a distinct person and therefore such services would be export of services.

Therefore, establishment of appellant in India and establishment of its parent company in Hong Kong are not establishments of a distinct person, and hence condition specified in clause (f) of Rule 6A(1) stands satisfied in the present case.

10. **Condition of clause (d) satisfied in the present case:**

In terms of Rule 9 of Place of Provision of Services Rules, 2012, the place of provision shall be in India only, when the

services provided by the appellant are held to be „intermediary services".

Intermediary has been defined under Rule 2(f) as under:-

> *(f) 'intermediary' means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of service (hereinafter called as the 'main service') or a supply of goods, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account.*

In the present case, the appellant is neither arranging nor facilitating provision of service between the parent company at Hong Kong and the third parties in India but is providing its services directly, on its own account, on principal to principal basis, hence appellant is not an „**intermediary**" and services provided by the appellant to its parent company in Hong Kong cannot be categorized as „**intermediary services**".

11. ***Appellant entitled to refund along with interest on amount paid under mistake of law :***

As the services provided by the appellant are „export of services" on which no service tax was payable, hence the amounts of Rs. 12,84,404/-& Rs. 9,82,965/- (cumulatively Rs. 22,67,369/-), paid as service tax, were paid under mistake of law and therefore the appellant is entitled to refund of the same. Further, once the said amount never partake the character of tax, hence the same was only deposit and therefore the appellant is entitled for interest also from the date of deposit till the date of actual refund.

12. In the impugned order, the Commissioner (Appeals) framed the issue:-

i) Whether the services provided by the appellant to their overseas client amounts to export of service or the appellant has performed the service as an intermediary / agents; and

ii) Whether the appellant is eligible for refund or not.

12.1 The Commissioner (Appeals) has observed that appellant is located in the taxable territory whereas their client M/s CHF International, Hong Kong is located outside the taxable territory. Admittedly, the appellant company is a subsidiary of the Hong Kong company. Thus, it is clear that one establishment of the appellant is in the taxable territory, and other establishment is in non - taxable territory i.e. Hong Kong. Accordingly, it has been held that both establishments are of a distinct person (same person), as per Explanation 3 to clause (44) of Section 65B of the Finance Act. Rule 6A(1)(f) of Service Tax Rules stipulates that the provider of service and recipient of service should not be establishment of a distinct person. If such condition exists, then the transaction will not be treated as export of service. In the facts and circumstances, this condition is not fulfilled. Further, observed that appellant has failed to submit corroborative evidence, such as copy of agreement etc. Further, in the order-in-original it is observed that on the invoices issued by the appellant it is mentioned - "being reimbursed of establishment expenses for the month". It is further held that appellant is working as an intermediary / agents of another establishment in a non-taxable territory, hence, service provided by appellant are not covered under Condition No. (d) of Rule 6A(1) of

Service Tax Rules, as the place of provision of such services is in India. It is further observed that in case of „intermediary services" under the Place of Provision of Services Rules, 2012, the place of provision shall be the location of service provider (India). Accordingly, refund was refused upholding the order-in-original. Being aggrieved, the appellant is before this Tribunal.

13. Heard the parties.

14. The appellant have reiterated the grounds before the Commissioner (Appeals) and have further relied on the ruling of Hon"ble Supreme Court in the case of **Vodafone International Holdings BV** vs. **Union of India (2012) 6 SCC 613**, wherein it has been held that a subsidiary and its parent company located in different taxable territories are totally distinct tax payer(s) or different persons/ entities.

14.1 Further, reliance is placed on the ruling of Hon"ble Gujarat High Court in the case of **Linde Engineering India Pvt. Ltd.,** vs. **Union of India -2020–TIOL-1285-HC-AHM-ST** wherein Explanation 3(b) under clause (44) of Section 65B have been considered and it has been held that service provided by a company in India, to its 100% holding company abroad, cannot be considered as an establishment of a distinct person and therefore such services would be export of services. Learned Counsel further states that admittedly appellant have provided the services on their own account which include assisting the receiver of services located outside of

India, in the matter of quality control, market research, management and business consultancy with respect to the products to be procured by the holding company in Hong Kong, from India. Admittedly, the appellant have received the charges for their services in convertible foreign exchange.

14.2 Thus, I hold that Rule 2(f) read with Rule 9 of Place of provision of Service Rules, 2012, clearly provides that „intermediary“ which means one who procure or an agent, does not include a person who provides the main service or supply of goods on his account. I find that the appellant have provided the services to their holding company located India outside India, on their own account. Thus, the appellant have exported their services.

15. In view of foregoing, I set aside the impugned order and allow these appeals. The appellant is entitled to refund of the service tax paid under mistake. Further, the tax has been paid under mistake, is in the nature of Revenue deposit and no limitation is attracted for refund on such deposit. Accordingly, I direct the Adjudicating Authority to grant the refund within a period of thirty days from the date of receipt of this order, alongwith interest @12% per annum, starting from the end of three months from the date of application (09.03.2017), till the date of disbursement of the amount.

(Pronounced on-08/10/2021).

Sd/-
(Anil Choudhary)
Member (Judicial)

Pant