[2016] 68 taxmann.com 301 (Mumbai - CESTAT)

CESTAT, MUMBAI BENCH

Commissioner of Service Tax

Vs.

Balaji Telefilms Ltd.

M.V. RAVINDRAN, JUDICIAL MEMBER
AND C.J. MATHEW, TECHNICAL MEMBER
APPEAL NO. ST/651/2010
CROSS OBJECTION NO. ST/CO.13/2011
ORDER NOS. A/86272-86273/2016/STB
SEPTEMBER 9, 2015

CASE REVIEW

FIL Capital Advisors (India) (P.) Ltd v. *CST* [Order Nos.A/738--742/15/SMB, dated 18-3-2015] (para 10); *AMP Capital Advisors India (P.) Ltd.* v. *CST* [Order Nos. A/1079-1082/15/SMB, dated 16-4-2015] (para 10); *CST* v. *Greater Pacific Capital (P.) Ltd* [Order Nos. A/834-838/14/SMB/C-IV, dated 25-4-2014] (para 10) and *Paul Merchants Ltd.* v. *CCE* [2013] 30 taxmann.com 23/38 STT 702 (New Delhi-CESTAT) (para 12) *relied on.*

CASES REFERRED TO

FIL Capital Advisors (India) (P.) Ltd. v. *CST* [Order Nos.A/738--742/15/SMB, dated 18-3-2015] (para 10), *AMP Capital Advisors India (P.) Ltd.* v. *CST* [Order Nos. A/1079-1082/15/SMB, dated 16-4-2015] (para 10), *CST* v. *Greater Pacific Capital (P.) Ltd* [Order Nos. A/834-838/14/SMB/C-IV, dated 25-4-2014] (para 10) and *Paul Merchants Ltd.* v. *CCE* [2013] 30 taxmann.com 23/38 STT 702 (New Delhi-CESTAT) (para 12).

V.K. Singh, Special Counsel *for the Appellant.* **Badrinarayanan**, Advocate *for the Respondent.*

ORDER

C.J. Mathew, Technical Member - Revenue is in appeal against order-in-original no.10/ST-II/KKS/2010 dated 7th September 2010 of Commissioner of Service Tax-II, Mumbai that dropped demand of Rs. 63,48,39.755 for the rendering of taxable service by M/s Balaji Telefilms Ltd. The respondent had claimed that the service for which consideration of Rs. 516,37,53,000/- between April 2006 and March 2008 has been received from M/s SGL Entertainment Ltd, Hongkong were exports as per Export of Service Rules, 2005 and in pursuance of a contract between the two dating

back to April 2006.

2. Under the said contract, the assessee produced television programmes which were, admittedly, to be uplinked by the Hong Kong entity for the benefit of viewers. The case of Revenue was that the production of these programmes were taxable under Finance Act, 1994 since 2004 under section 65(105)(zzu), i.e.,

> "(zzu) to any person, by a programme producer, in relation to a programme' with section 65(86b) defining a programme producer as
>
> (86b) 'programme producer' means any person who produces a programme on behalf of another person and programme being
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> (86a) 'programme' means any audio or visual matter, live or recorded which is intended to be disseminated by transmission of electro-magnetic waves through space or through cables intended to be received by the general public either directly or indirectly through the medium of relay stations"

3. There is no dispute that M/s Balaji Telefilms Ltd produces programmes which is a taxable service under section 65(105)(zzu) of Finance Act, 1994. There is also no dispute that M/s SGL Entertainment Ltd. has contracted with the respondent for production of programmes with intent for further distribution. Proceedings were initiated on 15th June 2009 to recover the tax liability that had allegedly not been discharged by the assessee who claimed that the consideration received from M/s SGL Entertainment Ltd. was not taxable being realisations arising from export of 'programme production service.' Revenue contends that these were not exports because these transactions did not lie within the ambit of Export of Service Rules, 2005 by failure to comply with conditions stipulated in the said Rules.

4. Rule 3 (2) of the said Rules underwent a change with effect from 1st March 2007 by substituting

> "(2) The provision of any taxable service specified in sub-rule (1) shall be treated as export of service when the following conditions are satisfied, namely:-
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> (*a*) such service is delivered outside India and used outside India; and
>
> (*b*) payment for such service provided outside India is received by the service provider in convertible foreign exchange.
>
> with
>
> (2) The provision of any taxable service specified in sub-rule (1) shall be treated as export of service when the following conditions are satisfied, namely:-
>
> (*a*) such service is provided from India and used outside India; and
>
> (*b*) payment for such service provided outside India is received by the service provider in convertible foreign exchange."

5. According to Revenue, the usage condition and currency condition, both common to the pre-amendment and post-amendment provisions, had not been satisfied in the transaction between M/s Balaji Telefilms Ltd and M/s SGL Entertainment Ltd because the programmes were in Hindi with intent to be distributed to viewers in India through channels in India and the contract designated the currency of payment in Indian Rupees.

6. In the impugned order, it was held that the appellant provides 'programme production service' to M/s SGL Entertainment Ltd while the uplinking from Hong Kong by M/s SGL Entertainment Ltd. for beaming to the distributors in India was in the course of rendering 'broadcasting service' taxable under section 65(105)(zk) of Finance Act, 1994; that the service rendered by the assessee being different from the service rendered by the overseas entity, it was held that the inference in the show cause notice that the destination of the service exported from India was ultimately to be India is not acceptable. Relying on the 'master circulars' of the Reserve Bank of India and paragraph 2.40 of the Foreign Trade Policy, the adjudicating authority also held that the consideration had been received in freely convertible currency. Revenue, aggrieved by the dropping of proceedings, is in appeal before us having reviewed the impugned order in exercise of powers under section 86(2) of Finance Act, 1994.

7. According to the appeal of Revenue, the adjudicating authority is in error and failed to appreciate that the programmes that were exported to Hongkong were beamed backed to India. This, in our considered opinion, is a fallacy that Revenue authorities, steeped as they are in the legacy of tax on 'visibles', are susceptible to. The reviewing authority appears to have ignored the fundamental aspect that the proceedings were initiated under Finance Act, 1994 and that the tax was sought to be levied on taxable services and any adjudication thereon shall necessarily be circumscribed by such. The findings cannot go beyond the services that are taxable under section 65(105) to focus on the manifest form of the service for determination of the usage. Prima facie, we do not find any merit in this line of appeal. We, however, do not fail to consider this in detail.

8. Learned Authorized Representative, while admitting that the transaction of the respondent that is sought to be taxed is undoubtedly with an overseas entity and hence likely to be deemed as export in 'colloquial' terms, argues that privilege of escapement from tax under Rule 4 of Export of Service Rules, 2004 is predicated solely upon fulfilment of the conditions in Rule 3(2) of the said Rules. Attention was drawn to the enunciation in 'Principles of Statutory Interpretation'[GP Singh, Thirteenth Edition p831]

> 'But equitable considerations are not relevant in construing a taxing statute and, similarly logic or reason cannot be of much avail in interpreting a taxing statute. It is well settled that in the field of taxation, hardship or equity has no role to play in determining eligibility to tax and it is for the legislature to determine the same'

9. It would appear that the learned Authorized Representative canvasses the view that every seeming export cannot be deemed to be one unless the words of the statute expressly accords it that status. Having noted that, it would also appear that the learned Authorized Representative may, unintentionally, no doubt, have described the review proceedings which does not appear, prima facie, to find sustenance; except for the reference to the use to which the programme is put by the overseas

entity, the review proceeding mirrors the show cause notice which had been considered at length and rejected in the impugned order. No substantive counter to the findings of the original authority have been adduced in the grounds of appeal. Mere reiteration of the show cause notice is what we notice; notwithstanding which, we consider the grounds of appeal in the hope that judicial determination will forestall a recurrence of such disputes.

10. This Tribunal has, in a number of decisions, examined the scope of Export of Service Rules, 2005; most, no doubt, in the context of eligibility for refund of CENVAT credit taken or tax paid on 'input services' utilized by exporters. These decisions have examined the condition of delivery/provision and, more particularly, the usage to which the output service has been put by the recipient of the service. Hence, their relevance to resolution of the dispute before us. Learned Counsel cites *FIL Capital Advisors (India) (P.) Ltd.* v. *CST* [Order Nos.A/738--742/15/SMB, dated 18-3-2015], *AMP Capital Advisors India (P.) Ltd.* v. *CST* [Order Nos. A/1079-1082/15/SMB, dated 16-4-2015] and *CST* v. *Greater Pacific Capital (P.) Ltd* [Order Nos. A/834-838/14/SMB/C-IV, dated 25-4-2014]. In these cases, tax was demanded on consultancy services rendered to overseas entities because Revenue was convinced that the overseas entities have then utilized that resource for investment participation in India and, therefore, did not lie within the ambit of 'used outside India.' The Tribunal has disabused this notion by holding that the terms of the agreement requiring delivery of outcomes to the overseas entity and receipt of consideration from the overseas entity was sufficient to conclude that the services had been delivered outside India.

11. At this stage, we would like to refer to our observation supra that the reviewing authorities had, inappropriately, placed emphasis on the usage by the recipients of the programmes produced by the appellants. We find that the activity that is liable to tax must be one which is specifically listed in section 65 (105) of Finance Act, 1994 and which, with reference to the business of the appellant is described in sub-clause (zzu). The appellant is a 'programme producer' within the meaning of section 65 (86b) and contracted with the overseas entity in that capacity. 'Programme' has been defined in section 65 (86a) in the context of the taxable entry making it clear that it is not the programme that is taxable but the service rendered by a programme producer in relation to a programme. There can be no doubt that, if the programme producer or any other person were to further disseminate the programme to others, such dissemination would be liable for tax as a separate and distinct service. Consequently, the usage of the programme after delivery to the overseas entity is irrelevant in deciding upon the tax liability as 'programme producer.' In the decisions cited supra, Revenue had sought to blur the distinction between investment advice and investment itself 'a contention that did not find favour with the Tribunal. In the present appeal, Revenue seeks to blur the distinction between the programme delivered abroad by the appellant and the subsequent broadcasting of that programme. We respectfully follow the settled law and reject the contention of Revenue that the distinction should remain blurred. Therefore, the service rendered by the respondent is delivered or provided from India to the overseas entity and thus conforms to the first part of the outflow condition.

12. The same provisions in the Rules have been cited by both sides to this dispute to bolster their respective contentions. The changes effected in the Rules from 'delivery' to 'provided from' were

considered to have differing implications but the lack of difference has been articulated in the decision of this Tribunal in *Paul Merchants Ltd.* v. *CCE* [2013] 30 taxmann.com 23/38 STT 702 (New Delhi-CESTAT). A difference of opinion required resolution by reference to a Third Member but the evolution of the principle of not subjecting export of services to tax having been elaborately and exhaustively discussed in the lead decision that went on to prevail as the majority view enables us to adjudge the present dispute. As was emphatically expressed by the Hon ble Member (Tech) therein:

> "19. ** ** **
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> The reservation of the Ld. SDR in accepting the decision in Muthoot Fincorp Ltd. is so vociferous that this bench is of the view that a second examination of the issue without any reference to the Board's Circular or the decision of the Tribunal in the case of Muthoot Fincorp Ltd. may help in avoiding such arguments in future on the same issue.
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> ** ** **
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> 23.2 ** ** **
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> The Appeal could have been disposed of by such brief observations and relying on the following decisions of the Tribunal namely,-
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> (*i*) *Nipuna Services Ltd* v. *Commissioner* - 2009(14) STR 706
>
> (*ii*) *Muthoot Fincorp Ltd* v. *CCE* Vizag 2010 (17) STR 303
>
> 23.3 Instead we have given more elaborate arguments to reaffirm the finding in the above decisions with the hope that it will clear up the cob-web in the ideas relating to the issue of export of services and will help in deciding such disputes in future."

13. That decision did consider the flow of money and its ultimate usage reminiscent of the movement of the programme canvassed by the reviewing authority in the present matter. The majority decision of the Tribunal in *Paul Merchants Ltd* (*supra*) has laid down that eligibility for exemption of a taxable service as export is predicated upon the providing that specific service to an entity outside India who makes over the consideration for the service so rendered. Therefore, the respondent in this appeal, having completed the rendering of the service of 'programme production' to the overseas entity has complied with the second leg of the first condition i.e. usage outside India.

14. That brings us to the second condition, viz., receipt of consideration in convertible foreign currency. The contract, undoubtedly, designates the consideration in Indian rupees. It is claimed by the respondent that this is normally resorted to so that the service provider is not put to loss on account of currency fluctuations and that, by such designation, the producer in India is assured of receiving the contracted amount; undeniably, a necessary factor in minimizing the risk of budgetary overrun. This justification is, unarguably, acceptable as logical.

15. The respondent did produce a certificate from Hongkong and Shanghai Banking Corporation Ltd., their bankers, indicating that inward remittance from the overseas entity was in convertible foreign

currency. The original authority rendered its findings after acknowledging this certificate. In the light of this, it is surprising that Revenue has chosen to argue that the condition of inward remittance in Export of Service Rules, 2005 had not been fulfilled.

16. Admittedly, the Indian Rupee is not a freely convertible currency and benefit of export privileges were sought to be denied on the ground that contract was designated in Indian rupees. By that very argument, Indian rupee could not have been received as inward remittance through the banking channels because of that very non-convertibility. Consequently, there is no justification for entertaining any doubt that inward remittances were in convertible foreign currency.

17. As both conditions for export in Rule 3(2) of Export of Service Rules, 2005 have been complied with, appeal of Revenue is without merit and is dismissed accordingly. CO is also disposed off.