# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
# BANGALORE

REGIONAL BENCH - COURT NO. 1

## Service Tax Appeal No. 1898 of 2010

(Arising out of Order-in-Appeal Nos. 207 & 208/2010 dated 04.06.2010 passed by the Commissioner of Central Excise (Appeals-II), Bangalore.)

**M/s. Sartorius Stedium India Pvt. Ltd.**
**(Formerly known as M/s. Sartorius India Private Limited)**
No.69/2 & 69/3,
Kunigal Road,
Nelamangala,
Bangalore – 562 123.

Appellant(s)

*VERSUS*

**The Commissioner of Service Tax,**
Bangalore Service Tax Commissionerate,
No.16/1, 5th Floor, S.P.Complex,
Lalbagh Road,
Bangalore – 560 027.

Respondent(s)

With

## Service Tax Appeal No. 1899 of 2010

(Arising out of Order-in-Appeal Nos. 207 & 208/2010 dated 04.06.2010 passed by the Commissioner of Central Excise (Appeals-II), Bangalore.)

**M/s. Sartorius Mechatronics India Pvt. Ltd.,**
No.69/2 & 69/3,
Kunigal Road,
Nelamangala,
Bangalore – 562 123.

Appellant(s)

*VERSUS*

**The Commissioner of Service Tax,**
Bangalore Service Tax Commissionerate,
No.16/1, 5th Floor, S.P.Complex,
Lalbagh Road,
Bangalore – 560 027

Respondent(s)

**APPEARANCE:**

Mr. Roshil Nichani, Advocate for the Appellant

Mr. Dyamappa Airani, Joint Commissioner (AR), for the Respondent

**CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)**
**HON'BLE MRS R BHAGYA DEVI, MEMBER (TECHNICAL)**

**Final Order No. 20648 - 20649 /2024**

DATE OF HEARING: 22.02.2024
DATE OF DECISION: 19.08.2024

**PER : DR. D.M. MISRA**

These two appeals are filed against the Order-in-Appeal No.207 & 208/2010 dated 04.06.2010 passed by the Commissioner of Central Excise(Appeals-II) Bangalore.

2. Briefly stated the facts of the present case are that the appellants are engaged in providing as well as receiving taxable service under the categories of 'Maintenance or Repair Services', 'Erection, Commissioning or Installation Services' and 'Business Auxiliary Services'(BAS, for short). During the relevant period 15.03.2005 to 31.03.2006 (appeal No.ST/1898/2010), they have received 'indent commission' from the overseas holding company M/s. Sartorius AG Germany. Alleging that the amount received by the appellant fall under the category of Business Auxiliary Service, show-cause notice was issued to them for recovery of the service tax amount of Rs.7,36,222/- with interest and penalty. Similarly in appeal No.ST/1899/2010, they have received 'indent commission' from their holding company during the period 15.03.2005 to 31.03.2006 but failed to discharge service tax; accordingly show-cause notice was issued to them for recovery of the service tax of Rs.21,85,250/- along with interest and penalty. Both the notices have been adjudicated by the adjudicating authority under respective orders confirmed the demands with interest and imposed penalties under Section 76, 77 and 78 of the Finance Act, 1994 against the appellants. Aggrieved by the said orders, the appellants filed appeals before

the learned Commissioner(Appeals) who in turn rejected the same. Hence, the present appeals.

3. Learned advocate appearing for the appellants has submitted assailing the Order as:-

- That the Appellants procured orders from the Indian companies for its holding company abroad (principal). It was the holding company in Germany that consumed the BAS services provided by the Appellants for which the Appellants received the 'indent commission' (consideration for having exported BAS), which was a pre-determined percentage of the sales on such orders procured by the Appellants. In other words, the BAS services were provided at the behest of the German holding company in exchange for a consideration. It was only the said holding company which was obliged to make payment for such BAS received by it and not its customers in India. The recipient of the BAS provided by the Appellants was, therefore, the holding company in Germany and not its customers in India.

- That the Appellants did not have any privity of contract / contractual relationship with the clients of the holding company in India. The client of the Appellants was its holding company abroad since the said holding company compensated the Appellants for such services (by way of an indent commission, which was the consideration for the BAS services provided). The Appellants did not receive any consideration from the customers of the Appellants' holding company.

- That the BAS provided by the Appellants, as brought out in the foregoing paragraphs, satisfied all the conditions of 'export of services' under Rule 3(3)(i) of Export Rules thereof since the same has been 'provided' and 'used' in or

in relation to 'commerce or industry' and the recipient thereof (the holding company) is located outside India.

- That the phrase *'<u>used</u> in or in relation to commerce or industry and the recipient of such services is located <u>outside India</u>'* provided in Rule 3(3)(i) of Export Rules is akin to the phrase "used outside India" provided in Rule 3(1)(iii) of the Export Rules (amended subsequently). Board Circular No.111/5/2009-S.T. dated 24-2-2009 clarified that *"For the services that fall under Category III [Rule 3(1)(iii)], the relevant factor is the location of the service receiver and not the place of performance. In this context, the phrase 'used outside India' is to be interpreted to mean that the benefit of the service should accrue outside India. Thus, for Category III services [Rule 3(1)(iii)], 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****. In all the illustrations mentioned in the opening paragraph,* what is accruing outside India is the benefit in terms of promotion of business of a foreign company." The BAS provided to the foreign holding company is, therefore, 'export of services', considering that it is the business of the said holding company in Germany that it being promoted in India.

- That even if it is considered that the Appellants were a 'commercial or industrial establishment' or 'office' of the German holding company in India in terms of the proviso to Rule 3(3)(i) of the Export Rules, even then the Appellants had satisfied all conditions thereof for 'export of services' since – **the service is delivered outside India and used in the business outside India**, considering that the foreign holding company has processed the orders of such customers and made sale

to such customers; **payment has been received by the Appellants in convertible foreign exchange**, which fact has not been disputed by the Respondent.

- That the issue at hand is covered by the judgments/decisions of the Hon'ble Bombay High Court in ***CST v. A.T.E. Enterprises Pvt. Ltd.,*** **[**2018 (8) GSTL 123 (Bom.)]; of the Hon'ble Delhi High Court in ***Verizon Communication India Pvt. Ltd. v. ACST,*** [2018 (8) GSTL 32 (Del.)]; of the Larger Bench of this Hon'ble Tribunal in ***Arcelor Mittal Stainless (I) Pvt. Ltd. v. CST,*** **[**(2023) 11 Centax 269 (Tri.-LB)]; ***Arcelor Mittal Stainless (I) Pvt. Ltd. v. CST,*** **[**(2023) 11 Centax 320 (T)]***; Paul Merchants Ltd. v. CCE,*** [2013 (29) STR 257 (T)] and a host of other decisions, wherein it has been held that procurement of orders on behalf of overseas principals, as carried out by the Appellants in the present case, qualifies as 'export of services' under Rule 3 of the Export Rules.

- That the SCN issued to the Appellant (in Appeal No.ST/1899/2010) is barred by limitation considering that the same was issued in December 2006, while the same ought to have been issued within 'one year' from the 'relevant date' under Section 73 of the Act, i.e. from 25.10.2005 (the last date on which the return was required to be filed). The SCN could only have been issued within one year therefrom, i.e. by 24.10.2006.

- That the extended period of limitation cannot be invoked for the following reasons: that the Appellants were under the *bona fide* belief that the service recipient was its holding company in Germany, considering that the indent commission was paid by such holding company.

The Appellants were, therefore, of the belief that the same qualified as 'export of services' under the Export Rules; that if an assessee has acted on its *bona fide* belief and understanding of the law, and if such understanding of the Appellants is established to be incorrect subsequently, that by itself would not attract the extended period of limitation. Reliance is placed upon ***Dabur India Ltd. v. CST*,** 2015 (39) STR 1021 (T) and ***CST v. Traffic Manager, Mumbai Port Trust*,** 2015 (37) STR 993 (T) for the same; that the 'indent commission' received by the Appellants was disclosed in their books of accounts/financials. Therefore, suppression of facts with the intent to evade payment of tax cannot be alleged; that the above issue came to be settled only by the Larger Bench of this Hon'ble Tribunal in ***Arcelor Mittal Stainless (I) Pvt. Ltd. v. CST,*** (2023) 11 Centax 269 (Tri.-LB), after a series of conflicting decisions by different Benches of the Tribunal; that merely because the Revenue takes a different position or reads a statutory provision differently, is no ground to invoke the extended period of limitation. This is notwithstanding that the Revenue may finally prevail in its interpretation of the statutory provisions and the assessee may not. Reliance is placed upon the judgment of the Delhi High Court in ***Pr. CGST v. Emaar MGF Land Ltd.,*** **[**2023 (74) GSTL 212 (Del.)] for the same.

- That equivalent penalty under Section 78 of the Act could not to have been imposed considering that there is no evidence on record to show that there was suppression of facts with the intention to evade payment of tax. It is settled law that merely because certain amounts were paid prior to adjudication, by itself, does not mean there was suppression of facts with the intention to evade payment

of tax. That equivalent penalty could not have been imposed in respect of allegation (c) in the SCN considering that the same pertained to 'import of BAS' from a foreign service provider during the period **09.07.2004 to 31.03.2006**. It is settled law laid down by the Hon'ble Bombay High Court in ***Indian National Shipowners Association v. Union of India***, [2009 (13) STR 235 (Bom.)] and a host of other decisions that a service recipient in India is liable to service tax in respect of services received from abroad only with effect from 18.04.2006, i.e. after enactment/insertion of Section 66A in the Act. In other words, the Act did not provide for the levy of tax during the relevant period (09.07.2004 to 31.03.2006), when the Appellant received BAS from abroad. Merely because the Appellant admitted its liability and paid the same does not mean that the same was taxable. There is no estoppel against the law. For this reason also, penalty under Section 78 of the Act could not have been imposed in respect of allegation (c) above. The tax and interest paid by the Appellant therefor ought to be refunded to the Appellant.

- That in any case, penalties could not have been imposed both, under Sections 76 and 78 of the Act, since the proviso inserted in Section 78 of the Act with effect from 10.05.2008, which provides that "*provided also that if the penalty is payable under this section, <u>the provision of Section 76 shall not be attracted</u>*", is clarificatory in nature and therefore retrospective as laid down by the Hon'ble Karnataka High Court in ***CST v. Motor World,*** **[**2012 (27) STR 225 (Kar.)]. The imposition of penalty under Section 76 of the Act is, therefore, contrary to the statutory provisions.

4. The learned AR for the Revenue reiterated the findings of the learned Commissioner(Appeals).

5. Heard both sides and perused the records.

6. The short issue involved in the present appeals for determination is: whether the appellants are required to pay service tax for receiving 'indent commission' from their overseas holding company. Undisputed facts are that the appellants are private limited company incorporated in India, subsidiary of M/s. Sartorius AG Germany. They are engaged in manufacture of filtration and fermentation equipments, weighing systems etc. The appellants also rendered BAS as commission agent to their foreign holding company. The appellants identify customers for the holding company in India who in turn place orders with their overseas company and a certain pre-determined percentage of sales called 'indent commission' in convertible foreign exchange received by the appellants. The question involved is whether the said indent commission is liable to service tax.

7. We find that the issue is covered by the judgment of the Larger Bench of this Tribunal in the case of ***Arcelor Mittal Stainless (I) Pvt. Ltd. Vs. CST, Mumbai-II*** [(2023) 11 Centax 269 (Tri. LB)]. In the said case, the Larger Bench confronted with the conflicting view on the question whether Arcelor Mittal Stainless (I) Pvt. Ltd., a subsidiary of Arcelor Mittal

Stainless International, Paris, France, who procures sale orders for the products manufactured by companies in India and abroad liable to discharge service tax on such commission. Department alleged that since Arcelor Mittal Stainless (I) Pvt. Ltd. received the commission in return of procuring orders on Indian manufacturers, the service would not qualify as an export service under the Export of Service Rules, 2005 and accordingly, demanded service tax from Arcelor India. After analysing the judgments of the Hon'ble Delhi High Court in ***Verizon Communication India Pvt. Ltd. Vs. Asst. Commissioner, Service Tax, Delhi-III*** [2018(8) GSTL 32(Del.)] which approved the view taken by the ***Paul Merchants Ltd. Vs. CCE, Chandigarh*** [2012(12) TMI 424-CESTAT, Delhi (LB)] case and other judgments on the subject, the Larger Bench observed as follows:-

> *54. The four issues raised in the reference order have been dealt with extensively and as they are intermingled, the reference is answered in the following manner: (i) Arcelor India, a service provider, is providing BAS service to Arcelor France, which is a service recipient. Arcelor India is, therefore, providing service to Arcelor France which is situated outside India and Arcelor India receives consideration in convertible foreign exchange. The service provided by Arcelor India is, therefore, delivered outside India and used outside India as is the requirement under the 2005 Export Rules prior to 01.03.2007 and Arcelor India provides services from India which are used outside India as is the requirement after 01.03.2007. It cannot, therefore, be doubted that Arcelor India provides "export of service" as contemplated under rule 3 of the 2005 Export Rules; and (ii) Arcelor France is an agent of the foreign steel mills and Arcelor India is its sub-agent. Arcelor India provides the necessary details of the customers in India to the foreign steel mills and, thereafter, the foreign steel mills and the Indian*

*customers execute a contract for supply of the goods. The goods are directly supplied by the foreign steel mills to the Indian customers. Arcelor India also satisfies condition (b) of rule 3(2) as payments for such service have been received in convertible foreign exchange.*

8. The principle laid down by the Larger Bench in the aforesaid case is squarely applicable to the facts of the present case. Hence, the services rendered by the appellant to their holding company would fall within the scope of Export of Service Rules, 2005. Consequently, the demand cannot be sustained.

9. In the result, the impugned orders are aside and the appeals are allowed with consequential relief, if any, as per law.

(Order pronounced on 19.08.2024)

**(D.M. MISRA)**
**MEMBER (JUDICIAL)**

**(R BHAGYA DEVI)**
**MEMBER (TECHNICAL)**

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