CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Service Tax Appeal No. 85536 of 2021

(Arising out of Order-in-Appeal No. NA/GST/A-III/MUM/118/2020-21 dated 28.01.2021 passed by the Commissioner of CGST & Central Excise (Appeals-III), Mumbai)

M/s. Sharda Cropchem Ltd. **Appellant**
2nd Floor, Prime Business Park,
Dashratlal Joshi Road,
Vile Parle (W), Mumbai 400 056.

Vs.

Commissioner of CGST & CE, Mumbai West **Respondent**
Mahavir Jain Vidyalay, C.D. Barfiwala Marg,
Andheri (W), Mumbai 400 058.

Appearance:

Shri Anurag Mishra with Shri Ashwini Kumar, Advocates, for the Appellant
Shri Nitin M. Tagade, Joint Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

Date of Hearing: 14.06.2023
Date of Decision: 19.07.2023

FINAL ORDER No. 86143/2023

PER: ANIL G. SHAKKARWAR

Present appeal is directed against the impugned order-in-appeal dated 28.01.2021 passed by Commissioner (Appeals-III), CGST & CX, Mumbai.

2. Brief facts of the case are that the appellant was engaged in marketing and sale of agrochemicals in overseas market as merchant trader. Appellant used to purchase goods from one country and sell the same to another country without bringing such goods to India. Appellant paid purchase commission, sales commission, insurance premium on insurance of goods, legal fees to legal consultants and advocates for attending appellant's

matters in foreign country, professional charges, service charges for services performed, advertising expenses, consultancy charges for registration of products in foreign countries and rent on immovable property. All said charges were paid by the appellant in foreign country. The purchase and sales commission, insurance premium etc. were paid in foreign countries. From September 2012 to January 2013, appellant paid service tax along with interest for delayed payment totally amounting to Rs.7,85,13,768/- for the above stated services received and consumed in foreign country for the period from 01.10.2007 to 31.12.2012. The said service tax along with interest was paid by the appellant on their own cost without any notice being issued from Revenue and without any enquiry being initiated by Revenue. Subsequently, appellant filed a claim for refund of the entire service tax along with interest paid by them on the ground that the services were rendered outside India and also were received outside India and, therefore, were not liable for service tax in terms of the provisions of Section 64 of Finance Act, 1994. The divisional Assistant Commissioner through his order-in-original dated 28.05.2013 sanctioned the said refund to the appellant on the ground that the services were rendered outside India and, therefore, were not liable to service tax in India in terms of the provisions of Section 64 of Finance Act, 1994 because as per the said provisions, service tax is extended to the territory of India except the State of Jammu & Kashmir. He further stated in his order-in-original that the goods for which the services were received were not exported from India and the services were received in foreign country in relation to the goods transferred from another foreign country. He further held that the said services received in foreign country do not fall in the category of taxable services as per the provisions of Finance Act, 1994 and, therefore, the provisions of Section 66A of Finance Act, 1994 were not applicable. He further held that the appellant had not provided any services within the territory of India for the financial years 2007-08 to 2011-12. The said order-in-original dated 28.05.2013 was reviewed by the jurisdictional Commissioner and an appeal was preferred before

the jurisdictional Commissioner (Appeals). The grounds of appeal *inter alia* included that Section 66A of Finance Act, 1994 deals with charging of service tax on services received from outside India and the services which were received by the appellant fall under Clause 3(iii) of Notification No. 11/2006-ST dated 19.04.2006 wherein the criteria of location of recipient of service in India is prescribed and, therefore, the said services were chargeable to service tax. It was further contended that the requirements for such category "(iii) are that the recipient of service would be located in India and service should be used in relation to the business or commerce" and that the appellant was engaged in business of commerce and the appellant has used services for their business of import and export. Appeal filed by Revenue before the Commissioner (Appeals) was allowed through order-in-appeal dated 19.05.2014. Aggrieved by the said order, appellant preferred appeal before this Tribunal. This Tribunal disposed of the said appeal through final order dated 17.10.2016 and remanded the matter to original authority. It was observed in the said final order dated 17.10.2016 that, to ascertain the status of the assesse as service recipient, it is necessary to verify the bills and invoices raised by service providers, payment transactions and treatment of payment transactions in the books of accounts of the assessee. The appellant preferred appeal against the said final order before Hon'ble Bombay High Court. Hon'ble Bombay High Court vide order dated 21.08.2018 decided the said appeal and held that the grievance of the appellant is not the remand, but only certain *prima facie* observations in the said final order and there were fears that such observations would influence the adjudicating authority to their prejudice and, therefore, the Hon'ble Court has observed that since the Tribunal has used the words "*prima facie* it seems" held that the views expressed by the Tribunal in the said final order dated 17.10.2016 are not final views of the Tribunal but are subject to change if necessary at the hands of the adjudicating authority on examination of facts. Subsequently, the Deputy Commissioner (Refunds) held the hearing and passed order-in-original dated 25.09.2020 rejecting

the refund claim already sanctioned to the appellant. In the said order-in-original dated 25.09.2020, the original authority has held that the taxability of services received by the assessee was never disputed and the appellant had self-assessed the service tax and paid the same with interest. He further held that the said tax was correctly paid since the services were covered under Clause 3(iii) of Notification No.11/2006-ST dated 19.04.2006 wherein the criteria of location of recipient of service in India is prescribed and, therefore, he held that the services were received in India and hence were taxable under reverse charge mechanism and service recipient, the appellant, was liable for payment of the said service tax. Appellant preferred appeal before the learned Commissioner (Appeals) which was decided through the impugned order-in-appeal. The learned Commissioner (Appeals) upheld the said order-in-original dated 25.09.2020. Aggrieved by the said order, appellant is before this Tribunal.

2. We have heard learned counsel for the appellant. He has submitted that the appellant has purchased goods in foreign country and sold them in foreign country and the goods were never received in India nor the goods were exported from India. He has further submitted that the first premises on the basis of which refund sanctioning order dated 28.05.2013 was reviewed by the jurisdictional Commissioner stating that the appellant has used services for their business of import and export, is factually incorrect. The original refund sanctioning order was reviewed by the jurisdictional Commissioner with an erroneous understanding that there was import and export. The fact is that there was neither import nor export and the goods never came to the territorial jurisdiction of India and were never exported out of India. Therefore, the services in respect of such goods were never consumed in India. He has further submitted that the services were received in respect of such goods in foreign country and the nature of services were purchase commission, sales commission, insurance premium on insurance of goods, legal fees paid to legal consultants and advocates, consultancy services for registration of certain products in certain countries

as per the local laws and procedures, registration fees as statutory fees, expenses on market research, testing charges, advertising expenses and professional charges for availing professional services and rent on immovable property situated at Dubai. He has submitted that all these services were provided by service providers outside India and all of them were consumed outside India. He has admitted the fact that the appellant is situated in India. However, none of the services were consumed in India. He has further submitted that Section 64 of Finance Act, 1994 does not authorize collection of service tax for services rendered outside India. He has further submitted that in view of the provisions of Section 64 *ibid*, the provisions of Section 66A cannot be interpreted in a manner that even if the services are provided outside India and consumed outside India, but just because the appellant is situated in India and they are engaged in business or commerce and, therefore, such services will attract service tax. He has further submitted that Section 66A cannot be read independent of Section 64 of Finance Act, 1994. He has submitted that the premises on which initial refund sanction order was challenged was wrong to the extent that it believed that the goods were imported and exported. He further submitted that throughout the review proceedings, the findings are that in terms of Rule 3 of Taxation of Services (Provided from Outside India & Received in India) Rules, 2006 the appellant is liable to pay service tax. He has stated that when Section 66A of Finance Act, 1994 was inserted through Finance Act, 2006, then CBEC had clarified through letter F. No. B1/4/2006-TRU dated 19.04.2006 in para 4.2.3 as follows:-

"4.2.3. In the Budget for 2006-07, Explanation to clause (105) of Section 65 providing for charging of service tax on taxable services received from outside India has been omitted and for this purpose a new Section 66A has been incorporated in the Finance Act, 1994. Section 66A is to be read with the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006. ***It may be noted that only services received in India are taxable under these provisions.****"*

Learned counsel for the appellant has further submitted that in view of the said clarification, services provided outside the taxable territory of India are not taxable as per the provisions of Section 64 read with Section 66A of Finance Act, 1994 and that the learned Commissioner (Appeals) has not given heed to any of the said clarifications given by CBEC and the submissions made by the appellant before him. He has further submitted that the question in the present appeal is whether the services received by the appellant outside India are to be treated as received in India and hence taxable as per the reverse charge mechanism.

3. Heard the learned AR. He has submitted that he supports the findings of the impugned order and stated that the appellant has business establishment in India and, therefore, as provided under Section 66A and Rule 3 of Taxation of Services (Provided from Outside India & Received in India) Rules, 2006, the appellant was liable to pay service tax. He has relied on the following case laws:-

(a) Indian National Shipowners Association vs. UOI [2008-TIOL-633-HC-MUM-ST]

(b) UOI & ors vs. Indian National Shipowners Association [2009-TIOL-129-SC-ST]

(c) Orient Crafts Ltd. vs. UOI [2006-TIOL-271-HC-DEL-ST]

(d) Paul Merchants Ltd. vs. CCE, Chandigarh [2012 (12) TMI 424 – CESTAT DELHI (LB)].

4. We have carefully gone through the records of the case and the submissions made. It is very clear to us that the appellant has a business establishment in India. It is further clear to us that they are purchasing goods in foreign countries and selling the same in foreign countries. It is also very clear that the said goods are neither imported into India nor are exported outside India. It is also very clear that various services

were received in respect of the said goods. It is also very clear that all services were provided by service providers situated outside India and they were consumed outside India and none of them were received in India. Under these circumstances, we have to examine whether in terms of the provisions of Section 64 and Section 66A of Finance Act, 1994 the appellant was required to pay the said service tax and if the said service tax was not payable by them where the refund granted to them was in accordance with law. We have decided to first understand the rulings by various judicial bodies relied upon by Revenue through learned AR. Learned AR has relied on ruling by Hon'ble Bombay High Court in the case of Indian National Shipowners Association. We understand from the said ruling that Hon'ble Bombay High Court had clarified that before enactment of Section 66A *ibid*, there was no authority vested by law in Revenue to levy service tax on a person who is resident in India and who has received services from outside India. We note that the period for which the present dispute relates is after the enactment of Section 66A *ibid*. Therefore, the said ruling by Hon'ble Bombay High Court which was relevant for the period before insertion of the said Section 66A is not relevant for deciding the present issue. The other ruling by Hon'ble Supreme Court relied upon by learned AR is in respect of Indian National Shipowners Association wherein the earlier referred ruling by Hon'ble Bombay High Court was not interfered with. The third case law relied upon by learned AR is the ruling by Hon'ble Delhi High Court in the case of Orient Crafts Ltd. Further, the learned AR has relied on this Tribunal's final order in the case of Paul Merchants Ltd. & Ors. We find that para 4 and para 5 in the ruling by Hon'ble Delhi High Court in the case of Orient Merchants Ltd. is relevant in the present case. The said paragraphs are reproduced below:-

"4. The contention of the learned counsel for the Petitioner based on the interpretation of Section 66A of the Act, is that any Service that is obtained by a person who has a fixed place of business or fixed establishment or permanent address in India is liable to tax for services availed by him in a foreign country. By

way of an example, learned counsel for the Petitioner has cited that if such a person in India goes abroad, and has a hair cut, he would be liable to pay service tax in India on the basis of Section 66A of the Act.

5. We are not at all convinced by this argument of learned counsel for the Petitioner. The Rules that have been framed by the Central Government make it absolutely clear that taxable service provided from outside India and received in India is liable to Service Tax. In the example given by the learned counsel for the Petitioner, there is no question on the service of a haircut having been received in India."

5. In view of the facts and the provisions of law, we note that even if a person has a fixed establishment in India, but if the services are provided and consumed in foreign country, then they are not chargeable to service tax in terms of Section 64 of Finance Act, 1994. The provisions of Section 66A of Finance Act, 1994 will operate when the person is having a fixed place of business in India and services are provided from outside India and consumed in India. In the present case, the services were not consumed in India. Therefore, as observed by Hon'ble Delhi High Court in the case of Orient Crafts Ltd., we are of the firm view that in the present case, the services were not consumed in India. We, therefore, hold that service tax was not liable to be paid by the appellant in the present case. We also observe that the appellant itself has paid service tax subsequent to the transactions and, therefore, they were eligible for the refund. During the period for which appellant did not pay service tax, Revenue did not initiate any enquiry and not raised any demand against the appellant. Appellant was in the same activity from 01.10.2007 and they paid service tax in the month of September 2012 and during said period of five years, Revenue did not raise any demand on the appellant. We, therefore, hold that the appellant was not liable to pay said service tax and refund of the service tax paid by them granted through refund order dated 28.05.2013 was in accordance with law.

6. We, therefore, uphold the order-in-original dated 28.05.2013 and set aside the impugned order and allow the appeal.

(Order pronounced in the open court on 19.07.2023)

(Anil G. Shakkarwar)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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7. I have gone through the draft order prepared by my learned brother, Member (Technical) and I am in complete agreement with his findings. However, I consider it proper to place some additional facts and laws for the purpose of better clarity and to substantiate the stand taken by us.

8. To start with, it is admitted fact that the appellant is before us in the second round of litigation after the matter was remanded back to the Commissioner for reconsideration on merit and after certain observations made by this Tribunal was in a way struck off by the Hon'ble Bombay High Court. Therefore, it is imperative to have a look at the observation made by this Tribunal in its previous order and to scrutinise carrying out the directions contained in the order by the authorities below. It would be appropriate to reproduce certain portions of the said remand order passed by this Tribunal in appeal No. ST/88685/14-Mum which has already been reproduced by the Commissioner (Appeals) in the order assailed herein. Para 6 to 9 of it reads as follows:-

> *"6. We find that in the instant case the Appellant have received services from entities located outside India in respect of sale of goods outside-India. We find from the*

submission and Paper book filed by the Appellant that the Appellant were mainly buying the goods from china or other countries and selling the same to third country. The Appellant's China office is coordinating the various activities to and on behalf of Appellant in relation to such transactions are receiving services from different service providers. We find from the Paper book that the bills for such services are raised by the Service provide in the name of Appellant at their Head office at Mumbai for which the Appellant have paid to the service providers in foreign exchange. The scanned copy of sample bill is as below: ***(not reproduced)***

7. We also find from the order of the appellate Commissioner that on seeking clarification by the Commissioner as to who is service provider, who is recipient, what is the service given and who has paid the amount for what reason, if no service was received by the amount paying person, the Appellant clarified that the service providers are agencies in foreign country, services are different as detailed in the Order-in-Original, appeal preferred by the revenue and their submissions. The payment has been made by Appellant because they had engaged the different agencies to provide services outside India.

8. We find that though the Section 64 envisages that the provisions of service tax extends to the whole of India. However, in the instant case looking to the above facts it has to be seen as to what the provisions prescribes in case where the outside service providers has though rendered to the person located in India and bills has been raised to such Indian entity who made payment of such services in foreign exchange. Section 66A of the Finance Act provides charge of services tax on services, in case of services provided by a person who has place of business, fixed establishment, permanent address or usual place of residence, in India. In such case taxable service shall be treated as having been rendered by the Service recipient.

Further we find that Rule 3 of Taxation of Services (Provided from Outside India and received in India) Rules, 2006 deals with the situation involved in present case i.e. Taxable services provided from outside India and received in India. Prime facie it seems that the case in hand is covered by the provisions of Section 66A and Rule 3 supra. However we find that the order passed by the refund sanctioning authority as well as first appellate authority have not verified the vital facts as above. We are of the prima facie view that in case the service received by the person situated in India from the persons situated outside India would be liable for tax. In the present case the goods were cleared from a foreign country to another foreign county but the services related to such transaction was received by the Appellant who has permanent place of business in India and in whose names the bills were raised and who made the payment in foreign exchange. It is identical to case where the goods are exported outside India but the services related to such exports are availed from the overseas service provider such as commission agent etc. In all such cases the service recipient in India i.e. Exporter is liable to service tax. However, all these aspects have to be gone into factually. <u>To ascertain the status of the Appellant as the service recipient, it is necessary to verify the bills and invoices raised by the service provides, payment transaction therefore, treatment of the payment transaction in the books of accounts of the Appellant. Further application of the ratio of the judgments cited by the Appellant can only be decided only after the verification of the entire transactions.</u>

9. As regards unjust enrichment, it is observed from the finding of the original authority that he has not verified the books of accounts of the Appellant and relied upon the submission made by the appellant in this regard and chartered accountant's certification. <u>It is incumbent on the adjudicating authority to verify from the books of accounts to ascertain the fact whether the incidence of service tax</u>

paid by the appellant has not been passed on or otherwise. Hence the aspect of the unjust enrichment also needs careful reconsideration. In view of our above observation and findings we thus remand the matter to the original authority to verify the above facts and decide the eligibility of the Appellant for refund."

(Underlined by me to emphasise)

9. Going by the observations made in the above order, it is manifestly clear that the appellant had its branch office in China from where goods were purchased and majority of the invoices were raised, against which service tax was paid under the reverse charge mechanism. Further, it is also clear that the appellant had agents/representatives in China and other countries wherein it was effecting purchase and sale of those purchased items and some of service providers were agencies in the foreign countries. More importantly, goods were cleared from one foreign country to another foreign country, for which the facts of the case can be stated to be identical with the cases where the goods were exported from India, but services related to such exports are availed from overseas service providers, which were mostly fact based situations and required to be ascertained to find out the exact status of the appellant as service recipient. On unjust enrichment, direction was also given to the adjudicating authority to verify the book of accounts to ascertain if duty element had been passed on to any other person!

10. In compliance to such direction, order was passed by the refund sanctioning authority on 25.09.2020 and the refund was rejected on the ground that the services rendered to the appellant fall under clause (iii) of Notification No. 11/2006-ST dated 19.04.2006 despite the fact that the observation of CESTAT, concerning *prima facie* view that services were received from outside by a person situated in India, that has been in a way expunged by the Hon'ble Bombay High Court.

11. Now coming to the compliance of the direction of CESTAT by the Commissioner (Appeals), who is competent also to make

further enquiry as may be necessary as contemplated under Section 85(5) of the Finance Act, 1994 read with Section 35A(3) of the Central Excise Act, 1944 it is, worthwhile, to reproduce his observation made in para 14 of his order dated 28.01.2021 that runs as follows:

"14. As per the direction of the CESTAT in the above para, I have gone through the Bills/Invoices raised by different service providers and found that the bills/invoices have been raised to M/s Sharda Cropchem Limited for various services provided by them.

a) It is also seen from the advises issued by M/s Sharda Cropchem Limited that <u>they have availed the service of commission agent for recovery of proceedings from export of the goods and paid commission as per the recovery</u>. It is further seen that TDS under sub-sec(6) of Section 195 of the Income Tax Act @20% plus cess has been recovered in some of the services from the foreign service provides while making payment to them.

b) Regarding unjust enrichment, it is seen that the as per the invoices/ bills produced before me by the assesse, <u>they have not passed on any incidence of service tax paid by them to any other person</u>. However it can not be ascertained whether the said amount is included in the cost of export while delivering the goods purchased from one country to another country."

12. From his order, it is also manifestly clear that the appellant had availed services of commission agent, there was no unjust enrichment noticeable and this observation was made after personal examination of bills and invoices raised by the service providers.

13. Now coming to the facts on hand, it is asserted by the appellant that service tax was not payable by it for services availed outside India in respect of trading being carried out in two or more foreign countries *inter se*. Denial of service tax to the appellant on the ground that the services received by the appellant falls under clause 3(iii) of Notification No. 11/2006-ST dated 19.04.2006 that deals with Taxation and Services

(Provided from outside India and Received in India), Rules 2006 is required to be examined further. Relevant sub-rule (iii) of the said Rules 2006, prevailing during the relevant time, reads as hereunder:-

*3.**Taxable Services provided from outside India and received in India***

Subject to section 66A of the Act, the taxable services provided from outside India and received in India shall, in relation to taxable services-

(i) specified in sub-clauses (d), (p), (q), (v), (zzq), (zzza), (zzzb), (zzzc), 1[(zzzh), (zzzr), (zzzy), (zzzz) and (zzzza)] of clause (105) of section 65 of the Act, be such services as are provided or to be provided in relation to an immovable property situated in India;

(ii) specified in sub-clauses (a), (f), (h), (i), (j), (l), (m), (n), (o), (s), (t), (u), (w), (x), (y), (z), (zb), (zc), (zi), (zj), (zn), (zo), (zq), (zr), (zt), (zu), (zv), (zw), (zza), (zzc), (zzd), (zzf), (zzg), (zzh), (zzi), (zzl), (zzm), (zzn), (zzo), (zzp), (zzs), (zzt), (zzv), (zzw), (zzx), (zzy), (zzzd), (zzze), (zzzf) and (zzzp) of clause (105) of section 65 of the Act, be such services as are performed in India.

***Provided** that where such taxable service is partly performed in India, it shall be treated as performed in India and the value of such taxable service shall be determined under section 67 of the Act and the rules made thereunder:*

*[**Provided further** that where the taxable services referred to in sub-clauses (zzg), (zzh) and (zzi) of clause (105) of section 65 of the Act, are provided as the case may be, situated in India at the time of provision of service, through internet or an electronic network including a computer network or any other means, then such taxable service, whether or not performed in India, shall be treated as the taxable service performed in India;]*

(iii) specified in clause (105) of section 65 of the Act, but excluding, -

a) Sub-clauses (zzzo) and (zzzv);

b) Those specified in clause (i) of this rule except when the provision of taxable services specified in clauses (d), (zzzc) and (zzzr) does not relate to immovable property; and

c) those specified in clause (ii) of this rule,

be such services as are received by a recipient located in India for use in relation to business or commerce."

14. A quick look at the said rule would clearly reveal that this rule is subjected to Section 66A of the amended Finance Act, 1994 that deals with "charge of service tax on services received from outside India", since the meaning of "subject to" as found from the English dictionary is "depending on something as a condition". It is worthwhile to also look into the provisions of Section 66A as with satisfaction of the said provision only the rules containing taxable services provided from outside India and received in India introduced vide Notification No. 11/2006-ST could only be scrutinized. It is, therefore, imperative to reproduce Section 66A also as follows:-

"***66A. Charge of service tax on services received from outside India***

(1) Where any service specified in clause (105) of section 65 is,--

a) Provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and

b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India,

Such service shall, for the purpose of this section, be the taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply:

PROVIDED that where the recipient of the service is an individual and such service received by him is otherwise than

for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply:

PROVIDED FURTHER that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the service is provided or to be provided.

(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

Explanation 1: A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country. (Underlined to emphasise)

Explanation 2: Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.]

[(3) The provisions of this section shall not apply with effect from such date as the Central Government may, by notification, appoint.]"

15. A close scrutiny of Section 66A under Clause 2 read with Explanation No.1 would clearly go in favour of the appellant since the order of CESTAT passed in 2014 and the order-in-appeal under challenge both have observed from the record and through examination of invoices respectively that not only the appellant had branch office in China but also it was operating through agencies to carry out the business of trading in two or more different foreign countries. In business parlance is treated as merchant trading. I am. Therefore, of the considered view that without satisfaction of the conditions of Section 66A, Rule 3 of the Taxation and Services (Provided from outside India and Received in India), Rules 2006 could never be made applicable to the appellant. Even otherwise also, for the sake of clarity, it is also required to be pointed out that Rule 3(iii) of the said

Rules 2006 introduced by Notification No. 11/2006-ST contains only exclusion clause(and no charging provision) to specify as to which services rendered in Clause 105 of Section 65 of the Act would be excluded from taxation under reverse charge mechanism.

16. A close reading of the said rule indicates three things –

(i) Taxable service should be received in India

(ii) Taxable service received in respect of immovable property and certain performance related services in India, which are taxable under sub Rule(i) and (ii) are excluded from taxation if received by a recipient located in India solely for use in relation to business or commerce.

Therefore, the last line appearing after sub-clause (iii) not a part of it but is the joinder of Rule 3 main provision so as to make it complete. It is to be read together with clause 3 beginning sentence in exclusion of (i), (ii) and (iii) so that the sentence is complete, while adding (i), (ii) and (iii) would being specific provisions into it or to get it excluded from the main provision. For a better clarity, I intend to rewrite Rule 3 in this way after omitting these three sub rules:

Rule 3. Subject to Section 66A of the Act, the taxable services provided from outside India and received in India shall, in relation to taxable services - … be such services as are received by a recipient located in India for use in relation to business or commerce.

17. However the omission of the word "in India" after "in relation to business or commerce" is conspicuous by its absence apparently for the reason that business or commerce even if carried out outside India, services are taxable provided they are received in India and satisfied the conditions enumerated in Section 66A of the Finance Act 1994. But, not only Explanation (1) to Clause-2 of Section 66A but also plethora of decisions including in the case of Infosys [2015 (37) STR 862 (Tri.-Bang.)], cited by the appellant have made it clear that if the said services are received by the branch offices or agencies of the assesses, the it is not taxable under Reverse Charge. Therefore, from the above discussions and provision of law as referred in

the preceding para, I have got no second thought to arrive at the conclusion that the appellant had received services from overseas service providers in foreign countries through its Branches and Agencies in respect of its traded goods for which it cannot be fastened with the liability of service tax as a 'deemed service provider' in India only for the reason that invoices are raised in its Indian address and payments are made from India. In fact, services were sought, received and consumed outside India and tendered to the appellant's agency or branch office located abroad.

18. In respect of payments made from India, it is noticeable from the sample invoices submitted additionally by the appellant that to the agents employed by the appellant in foreign countries and the service providers, all payments were made in foreign exchange from appellant's foreign exchange account maintained in the Union Bank of India from its Mumbai branch and it is surprising that the appellant had not claimed any benefit under Foreign Trade Policy or as a deemed exporter generating foreign exchange for India, since both the definitions of "import" and "export" as contained in Section 2(23) and Section 2(18) are not confined to the import taking place from outside into India and export taking place out of India to a place outside India, in view of the fact that both the definitions are conditional to its grammatical variations and cogent expression and general meaning of export in the business parlance is also equated with export from one country to another country. I, therefore, conclude my observation in going with my learned brother, Member (Technical) to say that the appeal succeeds and the order of the Commissioner Appeals in confirming Refund rejection order is set aside with consequential relief including quashing of ongoing recovery proceeding. Order of the Refund Sanctioning Authority passed on 28.05.2013 is hereby confirmed.

(Dictated and pronounced in the open court on dated 19/07/2023)

(Dr Suvendu Kumar Pati)
Member Judicial