

REGISTERED SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuff Parade,
Mumbai- 400 005

F.No.196/03/ST/15-RA /1262

Date of Issue: 28.03.2022

ORDER NO. 29/2022-ST(SZ)/ASRA/Mumbai DATED 24.03.2022 OF
THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR,
PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY
TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE
CENTRAL EXCISE ACT, 1944.

Applicant : M/s EMC Software and Services India Private Limited,
Bangalore

Respondent : Commissioner of Service Tax, Bangalore

Subject : Revision Applications filed under section 35EE of the
Central Excise Act, 1944 against the Order in
Appeal No. 853/2014 dated 16.12.2014 passed by
Commissioner of Service Tax (Appeals), Bangalore

ORDER

This revision application has been filed by M/s EMC Data Storage Systems India Pvt. Ltd., Bangalore (hereinafter referred to as 'the applicant') against the Order-in-Appeal No. 853/2014 dated 16.12.2014 passed by Commissioner of Service Tax (Appeals), Bangalore.

2. The brief facts of the case are that the applicant had filed a rebate claim of Rs. 93,56,503/- (Rupees Ninety Three Lakhs Fifty Six Thousand Five Hundred and Three only) for the period from October 2009 to March 2010, on 30.09.2010 under Notification 11/2005 dated 19.04.2005. The claim was filed for rebate of service tax paid on technical support services that were exported outside India by the applicant, under Rule 3 of the Export of Services Rules, 2005.

3. The Deputy Commissioner of Service Tax, Division-I, Bangalore vide Order-in-Original No.38/2013 dated 17/18.01.2013 rejected the said rebate claim on the following grounds:

- The applicant is rendering Product Marketing Support Service, Customer Support Service, Accounting Support Service. It is seen that the applicant is rendering these services in India and the end use takes place in India only. The applicant is acting as local distributor and promotes the sale of products;
- It is evident that the M/s EMC Information System International, Ireland are operating through the applicant for rendering services in India and there is no export of services;
- The applicant is registered for the provision of Business Auxiliary Services among others whereas in the export invoice the description of the services said to have been exported is mentioned as "Technical Support Service" which is not as per the agreement;
- The applicant is engaged in provision of services from both SEZ unit and non SEZ unit and they have not produced any proof that separate accounts are maintained for receipts and user of services

4. Aggrieved by the aforesaid Order-in-Original, the applicant preferred an appeal before Commissioner of Service Tax (Appeals), Bangalore who vide Order-in-Appeal No.853/2014 dated 16.12.2014, rejected the appeal of the applicant and upheld the impugned Order-in-Original. The Appellate Authority made the following observations

4.1 As regards the issue of registration of output service/business services, it is not mandatory as per the decision of CESTAT, Bangalore in the case of mPortal India Wireless Solutions Pvt Ltd vs. Commissioner of Service Tax, Bangalore [2012(27)STR 134(Kar)] wherein it has been held that 'Cenvat Credit of Service Tax-Registration with Department is not a pre-requisite for claiming credit'

4.2 CBEC Circular No 141/10/2011 dated 13.05.2011 has clarified with regard to 'used outside India'. In the instant case the applicant has exported 'Technical Support Service' to the customers of EMC ISI falling under 'Customer Support Service module' as provided in the customer agreement. In the Service Agreement, it is seen that the applicant renders Product Marketing Support Service, Customer Support Service and Accounting Support Service in the territory of India and the end users are located in India. Thus the effective user and consumption of service is in India and there is no export of service.

5. On being aggrieved by the said Order-in-Appeal, the applicant has preferred the present Revision Application mainly on the following grounds:

5.1 That in the current case, the moot question involved is whether Business Auxiliary Services provided by the applicant qualifies as export of service under Export Rules. That, the applicant has been engaged in provision of technical support services on behalf of its foreign client ie. EMC ISI. The said services have been categorized as "business auxiliary services" under the Service tax legislation and such categorization / classification has not been challenged / alleged as incorrect in the entire proceedings in the current case.

5.2 That the observations made by the CESTAT in the case of M/s Blue Star Limited [2014(12)TMI 25-CESTAT, Mumbai], M/s Paul Merchant Ltd [2013(29)STR 257LB], Microsoft Corporation [2014(36) STR.766(Tri.Del)], Gap International Sourcing (India) Pvt Ltd [2014-TIOL-465-CESTAT-Del] makes it is clear that in respect of service classifiable as Business Auxiliary Services, where the contractual recipient of services is located outside India, the services would be deemed as used outside India and delivered outside India. That the fact of whether the services are in relation to Indian market or involve work carried out in India would result in the services not qualifying as export of service.

5.3 That in view of the above judicial precedence export characterization of services of technical support carried out on behalf of foreign client which qualify as business auxiliary services is no more res-integra and disallowing the export characterization in the current case without proper consideration of the above judgments is completely unjustified and the impugned order deserves to be set aside on this ground alone.

5.4 CBEC vide Circular No. 141/10/2011 dated 13.05.2011 had clarified that the words "used outside India" mentioned in the export condition as prevalent during the relevant period should be interpreted in the context where the effective use and enjoyment of the service has been obtained.

5.5 The Appellate Authority has adopted a stand that technical support services provided by the Applicant on behalf of and for the benefit of its foreign client would be deemed as for the effective use and enjoyment of Indian customers. CESTAT in judgments, has in essence adopted a completely different view and observed that effective use and enjoyment of the services shall be in linked to the location of contractual service recipient. Since the impugned order has been passed by adopting an interpretation completely against the above observations of the CESTAT, same deserves to be set aside on this ground alone.

5.6' That the applicant has fulfilled all conditions pertaining to export of taxable service as per the "Export Rules" as prevalent during the relevant period.

6. Personal hearing was scheduled on 01.07.2021, 15.07.2021, 02.09.2021, 08.09.2021, 16.12.2021, 09.02.2022 and 16.02.2022. However, no one appeared for personal hearing on any of the dates fixed for hearing. Since sufficient opportunity for personal hearing has been given in the matter, the case is taken up for decision on the basis of the available records.

7. Government has carefully gone through the relevant records available in case file and also perused the impugned Order-in-Appeal.

8. Government observes that that the dispute in the present case is regarding admissibility of rebate of service tax paid on services exported by the applicant. The Appellate Authority has upheld the order of the original adjudicating authority rejecting the claim for rebate of the service tax paid on the services exported.

8.1 Government finds that at this juncture it is pertinent to examine Section 86 of the Finance Act, 1994 which deals with appeals to the Hon'ble Tribunal; the same is reproduced below:-

"Section 86. Appeals to Appellate Tribunal. –

(1) Save as otherwise provided herein an assessee aggrieved by an order passed by a Principal Commissioner of Central Excise or Commissioner of Central Excise under section 73 or section 83A by a Commissioner of Central Excise (Appeals) under section 85, may appeal to the Appellate Tribunal against such order within three months of the date of receipt of the order.

*Provided that where an order, relating to a service which is exported, has been passed under section 85 and the **matter relates to grant of rebate of service tax on input services, or rebate of duty paid on inputs, used in providing such service**, such order shall be dealt with in accordance with the provisions of section 35EE of the Central Excise Act, 1944(1 of 1944).*

Provided further that all appeals filed before the Appellate Tribunal in respect of matters covered under the first proviso, after the coming into force of the Finance Act, 2012(23 of 2012), and pending before it up to the date on which the Finance Bill, 2015 receives the assent of the President, shall be transferred and dealt with in accordance with the provisions of section 35EE of the Central Excise Act, 1944(1 of 1944)."

[Emphasis supplied]

8.2 A plain reading of Section 86 of the Finance Act, 1994 indicates that the power for Revision of Orders of the Commissioner (Appeals) by the Central Government, as provided for by Section 35EE of the Central Excise Act, 1944, is limited to those matters which relate to *grant of rebate of service tax or duty paid on input services which were used in providing a service which was exported*. As discussed above, the instant issue pertains to rebate of service tax paid on the services exported and not on inputs/input services used for providing the same and hence Government notes that in terms of Section 86 of the Finance Act, 1994, it does not have jurisdiction over any matter relating to the same.

9. In view of the above, Government dismisses the subject Revision Application as the same is non-maintainable due to lack of jurisdiction.


(SHRAWAN KUMAR)

Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. 29/2022-ST(SZ) /ASRA/Mumbai DATED 21-03.2022

To,

1. M/s EMC Software and Services India Private Limited,
Bagmane World Technology Centre, K.R.Puram
Marathahalli Ring Road, Mahadevapura, Doddanekundi Village,
K.R. Puram, Hobli,
Bangalore - 560048

Copy to:

- 1) The Principal Commissioner of Goods & Services Tax, Bengaluru East,
TTMC BMTC Bus Stand Complex,
HAL Airport Road Domluru, Bengaluru-560071.

2. The Commissioner of Central Goods & Services Tax, Bengaluru
Appeals-I, Traffic & Transit Management Centre : BMTC Bus Stand :
Hal Airport Road, Dommaluru, Bengaluru-560071
3. Sr. P.S. to AS (RA), Mumbai
4. Notice Board
5. Spare copy.