



W.P.(MD) No.15092 of 2022

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 10.04.2024

CORAM:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

**W.P.(MD) No.15092 of 2022
and
W.M.P.(MD) No.10797 of 2022**

M/S.Vuram Technology Solutions Private Ltd.,
represented by its Senior Finance Manager,
Mr.Hariprakash Neelamegam,
Module 1 and 2, Elcot Sez IT Building,
Navalpattu,
Trichy.

... Petitioner

/vs./

1.The Additional Commissioner of GST (Appeals),
Office of the Commissioner of GST & Central Excise (Appeals),
Coimbatore Circuit Office @ Thiruchirappalli,
No.1, Williams Road,
Cantonment,
Trichirappalli 620 001.

2.The Assistant Commissioner of GST and Central Excise,
Trichy I Division,
Trichy.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorarified Mandamus, calling for the records on the file of



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the 2nd Respondent pertaining to rejection order No.111/TRI-I/2019-20/Final dated 14.11.2019 and the Order in Appeal No.04/2020-TRY (GST) dated 20.08.2020 (hereinafter referred as to as the impugned order) passed by the 1st Respondent herein as the same been passed in violation of principles of natural justice and to quash and set aside the consequential impugned order in Order in Appeal No.04/2020-TRY (GST) dated 20.08.2020 same as illegal, arbitrary, violative of principles of natural justice.

For Petitioner : Mr.M.Dinesh

For Respondents : Mr.N.Dilip Kumar
Standing Counsel

ORDER

The petitioner has filed this writ petition against the impugned Order dated 20.08.2020 in Original No.4/2020-TRY (GST) in Appeal No.1/2020-TRY (GST) passed by the first respondent.

2. Operative portion of the impugned order reads as under:-

“From the above legal matrix, it is clear that provision of service constitutes export only if all the conditions are satisfied as stated under Section 2(6) of the IGST Act, 2017. The last condition of the impugned Section clearly says that 'the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8'. As per sub-clause (i) of Explanation 1 provided under Section 8(1) of the IGST, 2017 an establishment shall be treated as 'distinct person' if it has any other establishment outside India. The word 'not merely establishments of a



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*distinct person' employed in sub-clause (v) of Section 2(6) of the IGST Act, 2017 assume significance in the sense that the service recipient and supplier should not merely be distinct persons, which means both the persons i.e., supplier of service and recipient should not be related persons, supplier and recipient should not be having relationship of holding company or subsidiary respectively or vice versa. etc. Any transaction between the supplier and recipient of services should be at arm's length and both of them shall be independent, possess equal bargaining power and are not under pressure or duress. As stated above and as admitted by the appellant, in the instant case, Vuram Australia Pty Ltd., is their foreign subsidiary which is an extended arm of M/s. Vuram Technology Solution Ltd., and obviously both the appellant and the recipient of services have business interest of each other and they are 'merely distinct persons' as per the legal matrix. In an issue of similar nature, the Hon'ble Authority of Advance Ruling under GST, Maharashtra in the case of **Segoma Imaging Technologies India Pvt. Ltd., reported in 2019 (20) GSTL 611 (AAR-GST)** has held that transaction between two entities of which the subsidiary situated in India exported services to its holding firm situated in Israel whose controlling firm is in USA, cannot be held 'export of service as for as clause 2(v) of IGST Act, 2017 is concerned. The relevant passage of the decisions is reproduced below:*

The condition (v) of the definition of export of services' as per section 2(6) reads as: 'the supplier of service and the recipient of service are not merely establishment of a distinct person in accordance with Explanation 1 in section 8;'

As per this condition the supplier of service and recipient of service should be separate legal person and not mere an establishment of distinct person. In the present case, it is observed that R2Net which is based in USA and Segoma Israel is its subsidiary. Further Segoma India is a subsidiary of Segoma israel. So also we find that as per agreement between R2Net and their customer, R2Net lists on the system only those diamonds that are photographed with its proprietary Diamond Display Technology Segoma. Thus applicant does not have liberty to photograph and upload images except those finalized by R2Net. In view of this it appears that applicant is carrying on business in Indian territory as a representational office of Segoma Israel and thus is covered by Explanation 1 of Section 8 of the IGST Act. Applicant's submission in this regard is that they are established under the Indian Companies Act having separate PAN number and therefore it is not a branch, agency or representational office of Segoma Israel. However, the statutory compliances



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made by an applicant in a country, in this case India, would in no way alter the status or relationship between parties as discussed above.

Thus applicant also failed to satisfy this condition as well.....

In view of my above discussion I hold the appellant's services exported to M/s. Vurarm Australia Pty Ltd., cannot be considered as export of services as they have not satisfied clause (v) of Section 2(5) of the IGST Act, 2017 and accordingly, they are not eligible for refund for 'export of software development' services. Therefore, I uphold the order passed by the RSA rejecting the refund.”

3.By the impugned order, the first respondent has dismissed the appeal No. 1/2020-TRY (GST) against the order No.111/TRI-I/2019-20/Final dated 14.11.2019 rejecting the refund claim of filed by the petitioner under Section 54/55 of the CGST Act, 2017.

4.The specific case of the petitioner is that the petitioner has effected export of service to a subsidiary in Australia, name Vuram Australia Pty Ltd., Docklands, Australia and that the petitioner has discharged the service tax liability by debiting tax from its Electronic Credit Ledger for a sum of Rs.3,39,457/-.

5.However, the second respondent by an order dated 14.11.2019 in Rejection Order No.111/TRI-I-2019-20 Final has rejected the refund claim, which



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has now been wrongly upheld by the first respondent, vide impugned order in Appeal No.4/2020-TRY(GST) dated 20.08.2020 in A.No.1/2020-TRY(GST). The petitioner was entitled to file an appeal before the GST Tribunal under Section 112 of the CGST Act, 2017. Since the Tribunal has not been constituted, the petitioner is before this Court by way of this writ petition.

6.The learned counsel for the petitioner would submit that the first respondent has wrongly affirmed the order of the second respondent by confusing the status of the subsidiary as a distinct person in accordance with explanation 1 in Section 8 of IGST Act, 2017.

7.It is further submitted that the issue also stands now clarified by the clarification by the Central Board of Indirect Taxes and Customs vide Circular No.161/17/2021-GST dated 20.09.2021 bearing Ref.F.No.CBIC-20001/8/2021-GST. Para 5.1 and 5.2 of the said circular reads as under:-

“Clarification:-

*5.1. In view of the above, it is clarified that a company incorporated in India and a body corporate incorporated by or under the laws of a country outside India, which is also referred to as foreign company under Companies Act, are separate **persons** under CGST Act, and thus are separate legal entities. Accordingly, these two separate*



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persons would not be considered as "merely establishments of a distinct person in accordance with Explanation I in section 8."

5.2. Therefore, supply of services by a subsidiary/ sister concern/ group concern, etc of a foreign company, which is incorporated in India under the Companies Act, 2013 (and thus qualifies as a 'company' in India as per Companies Act), to the establishments of the said foreign company located outside India (incorporated outside India), would not be barred by the condition (v) of the sub-section (6) of the section 2 of the IGST Act 2017 for being considered as export of services, as it would not be treated as supply between merely establishments of distinct persons under Explanation 1 of section 8 of IGST Act, 2017. Similarly, the supply from a company incorporated in India to its related establishments outside India, which are incorporated under the laws outside India, would not be treated as supply to merely establishments of distinct person under Explanation 1 of section 8 of IGST Act 2017. Such supplies, therefore, would qualify as 'export of services', subject to fulfilment of other conditions as provided under sub-section (6) of section 2 of IGST Act."

8. That apart, the learned counsel for the petitioner placed reliance on the judgment of High Court of Delhi in ***Xilinx India Technology Services (P) Ltd., Vs. Special Commissioner Zone VIII*** reported in ***(2023) 99 GST 948 (Delhi): (2023) 78 GSTL 24 (Delhi)***. Specifically, a reference was made to para 10 and 11 following the above circular, which reads as under:-

"10. The services rendered by a subsidiary of a foreign company to its holding are not covered under section 2(6)(v) of the IGST Act and the same is beyond any pale of controversy in view of the Circular dated 20-9-2022 issued by the CBIC. The said circular, in unambiguous terms, clarifies as under:



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"5.1 In view of the above, it is clarified that a company incorporated in India and a body corporate incorporated by or under the laws of a country outside India, which is also referred to as foreign company under Companies Act, are separate persons under CGST Act, and thus are separate legal entities. Accordingly, these two separate persons would not be considered as "merely establishments of a distinct person in accordance with Explanation I in section 8".

5.2 Therefore, supply of services by a subsidiary/sister concern/group concern, etc of a foreign company, which is incorporated in India under the Companies Act, 2013 (and thus qualifies as a 'company' in India as per Companies Act), to the establishments of the said foreign company located outside India (incorporated outside India), would not be barred by the condition (v) of the sub-section (6) of the section 2 of the IGST Act 2017 for being considered as export of services, as it would not be treated as supply between merely establishments of distinct person under Explanation I of Section 8 of IGST Act, 2017. Similarly, the supply from a company incorporated in india to its related establishments outside india, which are incorporated under the laws outside India would not be treated as supply to merely establishments of distinct person under Explanation 1 of section 8 of IGST Act 2017. Such supplies, therefore, would qualify as 'export of services,' subject to fulfilment of other conditions as provided under sub-section (6) of section 2 of IGST Act

11.It is clear from the above that the impugned order has been passed without application of mind and in disregard of the provisions of law. The relevant circular was brought to the notice of the respondents by the petitioner. But respondent no. 1 completely ignored the same and proceeded to pass the order mechanically. "

9.The learned Standing Counsel for the respondents would submit that the impugned order of the second respondent as also the first respondent are well reasoned and do not warrant any interference under Article 226 of the Constitution of India.

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10. It is further submitted that the circular mentioned above was not available on the date of the order passed by the respondent and therefore, the petitioner cannot take advantage of the above circular. Hence, he prays for dismissal of this writ petition.

11. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Standing Counsel for the respondents.

12. The impugned order passed by the first respondent fairly concludes that the petitioner has satisfied the requirements of Section 2(6)(i) to (iv) of IGST Act, 2017.

13. In my view, the above interpretation placed by the first respondent is incorrect. Admittedly, the petitioner and its subsidiary are two distinct entities and therefore, it cannot be said that the petitioner has not satisfied the requirements of Section 2(6)(v) of IGST Act, 2017. The doctrine of the authority for advance Ruling in *Segoma Imaging Technologies India Pvt. Ltd.*, reported in **2019 (20) GSTL 611 (AAR-GST)** cannot be applied to the facts of this case.



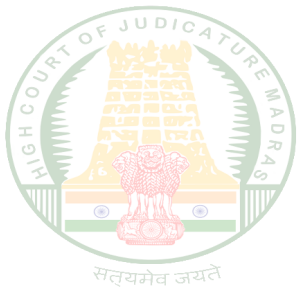
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14.It cannot be said that the petitioner and its subsidiary are not merely establishment of a distinct person in accordance with the explanation I in Section 8 of the IGST Act, 2017. The issue now stands clarified by Circular No. 161/17/2021-GST dated 20.09.2021 bearing Ref.F.No.CBIC-20001/8/2021-GST, content of, which has been extracted above.

15.This view has also been followed by the Delhi High Court in *Xilinx India Technology Services (P) Ltd., Vs. Special Commissioner Zone VIII* reported in *(2023) 99 GST 948 (Delhi):(2023) 78 GSTL 24 (Delhi)*. That apart, the Revenue cannot argue against its own circular, although such clarification in Circular of the Board are much binding on the petitioner nor on this Court. The view expressed in the said circular is correct and clarifies the legal position and therefore, this Court is not inclined to take a different view, though such a circular is not binding on this Court.

16.Since the view taken by the Board is correct, the impugned order is liable to be set aside. Consequently, the second respondent is directed to process



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the re-fund claim of the petitioner together with interest payable in accordance with the provisions of the Act as expeditiously as possible, preferably within a period of 12 weeks from the date of receipt of a copy of this order.

17.The Writ Petition stands allowed, with the above directions. No costs.
Consequently, connected Miscellaneous Petition is closed.

Index : Yes / No
Internet : Yes / No
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