

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO. 3

Service Tax Appeal No. 11873 of 2013-DB

(Arising out of OIO-5/ST/COMMR/SURAT-II/2013 dated 22/03/2013 passed by Commissioner of Service Tax-SURAT-II)

Basf India Ltd

Plot No. 6216,
Gidc, Ankleshwar,
Bharuch, Gujarat

.....Appellant

VERSUS

C.C.E. & S.T.-Surat-ii

New C.Ex Building...Opp. Gandhi Baug,
Chowk Bazar,
Surat,Gujarat - 395001

.....Respondent

APPEARANCE:

Shri. Jigar Shah & Shri Amber Kumrawat, Advocates for the Appellant
Shri Ajay Kumar Samota, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C.L. MAHAR**

Final Order No. A/ 11304 /2023

DATE OF HEARING: 03.03.2023
DATE OF DECISION: 21.06.2023

RAMESH NAIR

The brief facts of the case are that the appellant in order to redesign and replace its existing system with a single ERP system had entered into an agreement dated 07.01.2005 with M/s. CIBA Switzerland whereby it was agreed to share the costs incurred towards development of enterprise resource planning (ERP) software and reporting and replace existing system used by the appellant. As per the agreement the appellant was to receive the services in relation to software maintenance, hardware maintenance and IT operations implemented in the appellant's company. This agreement was also a cost sharing agreement. However, the ERP system was installed in August 2008 in appellant's company. Since the expenditure incurred after development of ERP system qualifies as capital expenditure the appellant accounted the same as capital expenditure and

shown the same expenditure under capital heads in their financial reports of the year 2006-2007, 2007 -2008 and 2008 -2009. The audit was conducted by the officers of the central excise wherein it was pointed out that appellant has received ERP related services from two service provider situated outside India and accordingly, appellant was liable to pay service tax under Section 66A. As per the audit officers the appellant had paid total amount of Rs. 2,21,73,200/- to M/s. CIBA Switzerland and BASF, South East Asia Singapore during the period from June 2006 to March, 2008 towards ERP system related services which should have been taxed under the category of Management or Business Consultant Service" and further paid amount of Rs. 2,90,65,606/- during the period from June 2006 to April, 2010 towards ERP system related service should be taxable under the category of "Information Technology Software Service". The appellant paid service tax of 23,81,235/- under the category of "Information Technology Software Service" along with interest of Rs 1,44,179/- on 22.10.2010 on total value of Rs 2,47,35,691/- which was paid by the appellant towards ERP related services during the period 2009- 2010. The appellant further paid service tax of 10,13,121/- along with interest of Rs. 3,00,600/- after audit and during investigation carried out by the department. The appellant was issued with show cause notice dated 04.10.2011 demanding amount of Rs. 58,54,029/- under reverse charge mechanism in terms of Section 66 A read with Rule 2 (1) (d) (iv) of Service Tax Rules, 1994 along with interest and penalty under Section 76,78,77(1) and 77 (2) of the Finance Act for the period 2006-07 to 2009-10. The department alleged that the ERP related services received by the appellant were taxable under Management Consultant Services for the period up to 15.05.2008 and thereafter from 16.05.2008 under "Information Technology Software Service" on introduction of said service.

The show cause notice invoked extended period of limitation under section 73 of the act on the allegation that the appellant suppressed information from the department. Further the show cause notice also sought to charge interest under section 75 of the act and impose penalties under sections 76, 77 and 78 of the Act. The learned Commissioners of Service tax Surat- II confirmed the demand of Rs. 58,54,029/- with interest and penalty under section 76, 78, 77 (1) and 77 (2) of the finance act, 1994 against the appellant the penalty under section 76 was imposed for the period till 10.05.2008. The Id. Commissioner confirmed and appropriated the amount of service tax of Rs. 35,96,982/- along with interest Rs. 5,57,723/- already paid by the appellant against the recovery of service tax amounting to RS. 58,45,029/- and interest. Being aggrieved by the aforesaid impugned order the appellant have preferred the present appeal.

2. Shri Jigar Shah, Learned Counsel along with Shri Amber Kumrawat, Advocate appearing for the appellant at the outset submits that the issue regarding taxability of ERP implementation related service under the category of "management or business consultant service" for the period prior to 16.05..2008 is no more *res- integra* in view of the decision of CESTAT Bangalore in the case of IBM India Pvt. Ltd. – 2009 (4) TMI 314 which in turn has been affirmed by the Hon'ble Supreme Court as well. He further submits that the demand of service tax in the present case has been under the category of " Management and Business Consultant Service" for the period up to 16.05.2008 and under the category of "Information Technology Software Service" for the period post 16.05.2008. It is his submission that the appellant have discharged the applicable service tax under the category of "Information Technology Software Service" in respect of all the payment made by it post 16.05.2008 along with applicable interest for the delay in payment of tax.

2.1 He further submits that as regard the payment made by the appellant prior to 16.05.2008 since no liability for payment of service tax could arise under the category of "Information Technology Software Service" as the same was introduced with effect from 16.05.2008 the Id. Commissioner has erroneously confirmed the demand for the service tax under the category of management and business consultant service.

2.2 He, without prejudice, to his above submission further submits that arrangement in the present case is for sharing of costs and not for provision of service and hence, no liability of service tax could arise. He placed reliance on the following judgments:-

- Intercontinental Consultants & Technocrafts Pvt. Ltd – 2013 (29) STR 9 (Del.)
- Sercon India Pvt Ltd – 2013 –TIOL – 223- HC- DEL-ST
- Hazira LNG Pvt. Ltd – 2022 (11) TMI 437
- Gujarat Sidhee Cement Ltd - 2019 (5) TMI 1459
- Reliance Ada Group Pvt. Ltd - 2016 (3) TMI 810
- UOI vs. Intercontinental Consultants & Technocrats Pvt. Ltd – 2018 (3) TMI 357
- CST vs. Bhayana Builders (P) Ltd – 2018 (2) TMI 1325

2.3 He further submits that implementation of software is not leviable to service tax under the category of "Management or Business Consultant Service". He referred to the definition of Management Consultant in term of 65(65) and 65 (105)(r) of the Finance Act, 1994. He also refer to research publication namely "Consulting to Management" by Englewood Cliffs, NJ. Prentice- Hall,1983.

2.4 By referring to the above he submitted that the appellant was not receiving advice consultancy or technical assistance and therefore, cannot be covered under the ambit of management consultancy.

2.5 Without Prejudice, to his above submission he further submits that service received by the appellant is taxable under "information Technology Software Service" with effect from 16.05.2008 because when a subsidiary entry introduced without changing the existing entry it is presumed that the early entry did not cover the activity of new entry. In this regard he placed reliance on the following judgments:-

- BCCI vs. CST, Mumbai -2007 (7) STR 384 (Tri. Mumbai)
- M/s. Glaxo Smithkline Pharmaceuticals Ltd. – 2006 (3) STR 711
- CCE, Chennai vs. MRF Ltd – 2006 (3) STR 434 (Tri. Chennai)
- Ankit Consultancy Limited - 2007 (6) STR 101
- Waters India Limited – 2007 (6) STR 8
- Diebold Systems (P) Ltd - 2008 (9) STR 546

2.5 He also argued value of services provided by the appellant should be treated as cum tax. Therefore, the calculation of service tax is demanded is incorrect. In this regard he placed reliance on the following judgments:-

- Sri Chakra Tyres – 1999 (108) ELT 361
- CCE vs. Maruti Udyog Limited - 2002 (49) RLT 1 (SC)
- Rajmahal Hotel vs. CCE – 2006 (4) STR 370
- Gem Star Enterprises (P) Ltd vs. CCE – 2007 (7) STR 342
- Panther Detective Services vs. CCE – 2006 (4) STR 116 (Tri. Del)
- Advantage Media Consultant – 2009 (14) STR J49 (SC)

2.6 He also submits that the extended period of limitation is not invocable as there is no suppression of the fact in the present case therefore the demand is time bar. He placed reliance on the following judgment:-

- Secretary, Town Hall Committee vs. CCE, Mysore – 2007 (8) STR 170 (Tri.Bang)
- K.K. Appachan vs. CCE , Palakkad – 2007 (7) STR 230 (Tri. Bang.)

- Continental Foundation Jt. Venture vs. CCE, Chandigarh – I-2007(216) ELT 177 (SC)
- CCE, Mumbai IV vs. Damnet Chemicals Pvt. Ltd – 2007 (216) ELT 3 (SC)

2.7 Alternatively he submits that in any case the entire issue is revenue neutral as the appellant are in position to avail the cenvat credit of service tax paid on the services received from the overseas service provider. In this regard he placed reliance on the judgments :-

- Amco Batteries Ltd. Vs CCE, 2003 (153) ELT 7 (SC)
- International Auto Ltd. Vs CCE, 2005 (183) ELT 239 (SC)
- CCE Vs Narayan Polyplast Ltd., 2005 (179) ELT 20 (SC)
- CCE VS Narmada Chematur Pharma, 2005 (179) ELT 276 (SC)
- CCE VS. Textile Corporation, 2008 (231) ELT 195 (SC)
- CCE VS. Jamshedpur Beverages, 2007 (214) ELT 321 (SC)
- CCE VS. Coca Cola India (Pvt.) Ltd 2007 (213) ELT 490 (SC)
- Alembic Vs CCE, 2007 (218) E.L.T. 607
- CCE VS Indeos Abs Ltd., 2010 (254) ELT 628 (Guj)

2.8 He further submits that penalties in the present case are not imposable as the issue involved in the present case is interpretation of statutory provision. Moreover, simultaneous penalty under section 76 and 78 of the FA, 1994 cannot be imposed in view of the decision of Gujarat High Court in the case of M/s. Raval Trading Company vs. Commissioner of Service Tax – 2016 (2) TMI 172. In the facts of the case no penalty is applicable invoking section 80 of the Finance Act, 1994.

3. Shri Ajay Kumar Samota, Learned Superintendent (AR) reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both sides and perused the record. We find that the appellant have received services from

foreign based provider namely CIBA, Switzerland and BASF, SEA, Singapore towards ERP system related services. As per the revenue, the said service up to 15.05.2008 is classifiable under management or business consultant service whereas revenue itself has admitted that the same services is classified under "Information Technology Software Service" w.e.f 16.05.2008. This clearly shows that the service received by the appellant towards implementation of ERP system related services is falling under "Information Technology Software Service". Under this admitted position by the Revenue itself the said service cannot be taxed prior 16.05.2008 under "Management or Business Consultant Service" therefore, the service tax demand which is disputed up to 15.05.2008 is not sustainable under "Management or Business Consultant Service". The very same issue under identical fact has been considered by CESTAT Bangalore in the case of IBM India Pvt. Ltd. – 2009 (4) TMI 314 wherein it was held as under :-

"6. We have carefully gone through the records of the case. The point at issue is the leviability to Service Tax under the category of 'management consultancy service' in respect of the ERP implementation services. It is seen that the Department attempted to classify the ERP services under 'management consultancy service' earlier and the Tribunal's decisions categorically held that during those time, the said services would fall under the category of consulting engineering services, however, they were excluded from the scope of consulting engineering services by virtue of initially an exemption Notification 4/99-S.T., dated 28-2-1999 initially and later by excluding it from the scope of 'consulting engineering services' in the definition itself. Once a particular service is excluded from the scope of service tax where it normally is supposed to fall then it cannot be taxed under some other category. This principle has been followed in the case laws of Federal Bank. Ltd. and also Lal Pathlabs Ludhiana, Collection Centre cases which have been cited earlier. However, w.e.f. 16-5-2008, information technology service was introduced. The definition of information technology service is

"any service provided or to be provided to any person in relation to information technology software for use in the course, or furtherance, of business or commerce, including.

- (i) development of information technology software,*
- (ii) study, analysis, design and programming of information technology software,*

(iii) *adaptation, up gradation, enhancement, implementation and other similar services related to information technology software,*

(iv) *providing advice, consultancy and assistance on matters related to information technology software, including conducting feasibility studies on the implementation of a system, specifications for a database design guidance and assistance during the start-up phase of a new system, specifications to secure a database, advice on proprietary information technology software,*

(v) *acquiring the right to use information technology software for commercial exploitation including right to reproduce, distribute and sell information technology software and right to use software components for the creation of and inclusion in other information technology software products.*

(vi) *Acquiring the right to use information technology software supplied electronically."*

7. *In the present case, the ERP implementation service is definitely for use in furtherance of business and commerce and the service under dispute is for the implementation. So, implementation of the ERP services is specifically covered under the information technology service, which was effective only from 16-5-2008. Under these circumstances, it cannot be liable to Service Tax for a period prior to that. In the present case, the entire period is prior to 16-5-2008. The appellants have clearly shown that prior to 16-5-2008, even the services rendered by the appellant were excluded from the scope of consulting engineer's service and also the judicial pronouncements made it clear that they would not be covered under the management consultancy services. In view of these, there is no merit in the demands confirming the Service Tax of the services under the category of management consultancy services for the period prior to 16-5-2008. It should be borne in mind that the appellants have already been paying the Service Tax for ERP Planning and advice under the category of management consultancy service. Hence, the impugned orders have not merit. We set aside the same and allow the appeals with consequential relief."*

From the above decision it can be seen that the service of ERP system implementation in the above cited decision and that of appellant case are absolutely identical. Accordingly, the service tax demand under the head of "management or business consultant service" for the period prior to 16.05.2008 is not sustainable. We further find that as of now it is settled legal position in the various decision cited by the appellant that if any new entry of service is introduced from a particular day the same cannot be taxed under some different existing entry prior to the enactment of new service entry for the reason that the introduction of the new service itself

shows that since the same was not taxable under the existing entry prior to its introduction the same was not taxable prior to its introduction, for this reason also the revenue itself admitted that very same service of ERP implementation is classifiable under "Information Technology Software Service" w.e.f 16.05.2008 and the same was not taxable prior to this date under management or business consultant service, for this reason also the demand for the period prior to 16.05.2008 is not maintainable.

4.1 As regard the service tax liability for the period from 16.05.2008, the same has been discharged by the appellant along with interest. Hence, the same is maintained. Since the issue involved is of pure interpretational nature no mala-fide can be attributed to the appellant for non-payment or short payment of service tax, moreover, there is force in argument of the learned counsel that since the appellant was entitled for cenvat credit of the service tax demanded, entire issue is revenue neutral. Considering this undisputed fact and overall facts and circumstance of the case we are of the view that the appellant has made out a strong case for wavier of penalties invoking Section 80 of the Finance Act, 1994. Accordingly, we set aside the penalties imposed in the impugned order.

5. As per above discussion and finding impugned order is modified to the above extent. Appeal is allowed in above terms.

(Pronounced in the open court on 21.06.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

C.L.MAHAR
MEMBER (TECHNICAL)