

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

Regional Bench COURT-2

Service Tax Appeal No. 2079 of 2012

[Arising out of the Order-in-Original Nos. 62/2012 dated
27.04.2012 passed by the Commissioner of Service Tax, Bangalore]

**M/S. SASKEN COMMUNICATION
TECHNOLOGIES PVT. LTD.,**

No. 139/25, Domlur Ring Road,
Bangalore- 560 071

.....Appellant

VERSUS

COMMISSIONER OF SERVICE TAX

1st to 5th Floor,
TTMC Building, above BMTC Bus stand,
Domlur,
Bangalore – 560 071

.....Respondent

Appearance:

Shri. Prateek Marlecha, CA for the Appellant

Shri. Neeraj Kumar, Authorized Representative for Respondent

Coram:

Hon'ble Mr. P.A. Augustian, Member (Judicial)

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

FINAL ORDER No. 20522 of 2024

Date Of Hearing: 21.12.2023

Date Of Decision: 20.06.2024

Per: P. A. Augustian

M/s. Sasken Communication Technologies Pvt. Ltd, Appellant
is engaged in software development service and registered as
provider of 'Consulting Engineering Services', 'Manpower

Recruitment or Supply Agency Services' and 'Business Auxiliary Service'. During the course of Audit, it is observed that Appellant has not paid service tax of Rs. 12,84,41,558/- for the period from October 2005 to March 2007 under the category of 'Manpower Recruitment and Supply Service'. Accordingly, show cause notice was issued and the Adjudication Authority as per the impugned order confirmed the demand of duty and also imposed penalties under various provision of law. Aggrieved by said impugned order, present appeal is filed.

2. During the hearing, Learned Chartered Accountant (CA) for the Appellant submits that the service provided by the Appellant is in the nature of 'Information Technology Software Service' which are not liable to service tax during the period under demand and the same could not be termed as manpower supply as they were engaged in the activity of development and testing of software. Merely, if the billing was made on the basis of man days/man hours, said activity could not be termed as manpower supply service. The Department's contention is based on the nature of consideration received by them on manpower/man-hours basis and wrongly classified the demand of service tax under manpower recruitment or supply service. Further, Service Tax on Information Technology software was introduced only w.e.f 16.05.2008.

3. The Learned Chartered Accountant also drew our attention to the clarification issued by Ministry of Finance vide DO F No. 334/1/2003 – TRU dated 28.02.2003, where it is clarified that "computer enabled services namely data processing, networking,

back office processing, computer facility management shall not be subject to service tax. The above issue was further clarified vide Circular No. 59/8/2003 dated 20.06.2003, where it is explained that Information Technology service meant any service in relation to designing, developing or maintaining of computer software or computer data processing or system networking or any other service primarily in relation to operation of computer system. If the output service provided by a service provider was in the nature of the above operation such exclusion would operate. Further, it is submitted that this Tribunal in the matter of M/s Dell International Services India Pvt. Ltd. Vs. CCE 2010 (17) STR 540 (Tri-Bang) held that as per CBEC clarification dated 21.08.2003, services in the nature of back office accounting, call centre service and IT support services were not covered under 'Information Technology Services'. However, back-office operations primarily in relation to operation of computers such as data processing, networking, computer facility management would get covered under the 'Information Technology Services.'

4. Learned Chartered Accountant submits that the activity of the appellant is to complete the project and not mere supply of manpower, and to substantiate the same, Learned Chartered Accountant drew our attention to agreements entered by Appellant with different customers and submits that even as per impugned order, adjudication authority also admits that the agreements entered by Appellant with different customers are for the development of software, only. Learned Chartered Accountant

further submits that even as per the special terms in such contract, the Appellant agreed that it will comply with all immigration related regulations including all labour condition application and other requirements for contract personnel in H1B status related to work authorisation as person for contract personnel provided to TI. The Learned counsel drew our attention to following details tabulated as below;

Sl. No.	Name of the Customer	Specific clauses in Work Order	Remarks
1.	Samsung Electronics, India Software Operation	Exhibit A-(Page No.38) Clause 1- Service areas Clause 2 – Scope of project	As per Clause 2 of Exhibit A, Sasken is required to provide the following services:- a. Multimedia application development/customization,integration and testing b. B. IMS client integration c. C. Protocol Testing d. Camera Application Development e. Inveiw of the above, it is evident that the scope of service is not to supply skilled staff as per customers requirement. The scope of services is to develop a software.
2.	Nokia Corporation	Clause 2 – Purpose of the Project plan – (page No. 46) Clause 3.2 – Responsibility of Nokia and	As per Clause 3.2, Sasken is responsible for to perform the development and test the solution as required by Nokia.

		Developer – (Page No. 47)	
3.	Nokia Networks	Clause 1 – Purpose of the Project Order– (Page No.53) Clause 1 of Appendix 1 – Project Scope – (Page No. 56)	As per Clause 1, the agreement is for Software Development Subcontracting. Further as per the scope of services, Sasken is responsible to develop and test the software.
4.	Nokia Networks	Clause 1 – Project Scope Clause 2 – Deliverables – (Page No.62)	As per the scope of services, Sasken is responsible for the Development of Managed Object Framework Desktop.

5. Learned Chartered Accountant also drew our attention to the judgment of the Hon'ble High Court of Karnataka dated 15.04.2011 in W A No. 118-129/2011 in appellant's own case wherein the Hon'ble High Court considered the issue in a different situation, while considering the dispute with Deputy Commissioner of Commercial Taxes and held that;

"Nature Of Contract:

44. In fact, a careful reading of the agreement shows that, the employees of the assessee and the employees of the customer have to work hand in hand, consult at every stage, have interactions and understand the need and requirement of the customer and through their employees, the software is to be developed. The technicians of the assessee and the employees of the customer are working together at the project site. In most of the cases, the service rendered by the assessee is in the nature of making one of the inputs into a final product which is produced at the project place with the assistance of the staff of service providers. In fact the material on record discloses that the customers have engaged the services of several service providers, who have expertise

in different fields and all of them put their mind and hands together and find a solution to the problem of the customer. The end product i.e. the ultimate software, is not necessarily the work of any one such service provider. It is a collective effort. Nobody can claim that the end product exclusively belongs to them except the customer who has paid for the service rendered by the various service providers."

6. Learned Chartered Accountant further submits that the issue is squarely covered by the decision of the Hon'ble Tribunal in the matter of M/s Infotech Enterprises Ltd Vs. CCus, CEx & ST (reported in 2020 (43) GSTL 540 (Tri-Hyd)).

"9. The argument of the Department is that the billing is done by the subsidiary in terms of number of man days of different persons required/utilised for performing the services. It is a common practice in business for manpower or consultancy firms to bill the clients in terms of number of man hours of the personnel required at different levels required. Even, advocates may charge their clients for the number of hours spent on their case. Merely because the total amount has been billed using the number of man hours/man days as a measure, it does not become logic is accepted, every case where the billing is done based on the number of man hours/man days should be treated as a manpower supply service. If this manpower supply service. The real test of determining the nature of service is to go through the agreement to understand what is the deliverable which the service provider has to deliver to the service recipient. In this case, this deliverable service is the delivery of software services to the clients of the service recipients i.e., the appellant. We, therefore, are of the considered view

that the demand made by the Revenue upon the appellant in the two show cause notices under the head "manpower recruitment or supply agency service" under reverse charge mechanism needs to be set aside along with interest and we do so. Consequently, penalties imposed upon the appellants under Section 76, 77 and 78 also need to be set aside and we do so."

7. The Learned Chartered Accountant for the Appellant also drew our attention to the decision of the Tribunal in the matter **of Sak Soft Limited Vs. Comm. GST & CEx** and as per the Final Order No. 40735/2021 dated 13.01.2021, it is held that;

"22. It is pertinent to say that in the Order-in-Original, the original authority has discussed the agreements in regard to three clients only. Para 12 of Order-in-Original, contains the findings with regard to manpower recruitment or supply agency service. Only the facts with regard to GE Capital Corporation, ABN AMRO Bank, Societe Generale Global Solution Centre Pvt. Ltd., have been taken up for discussion by the original authority. In para 12.6, it is stated by the original authority that the contention of the appellant that all the staff / qualified personnel employed by them are on their pay rolls and not in the pay rolls of the clients to be untenable. In fact, this is the underlying essence of control and supervision which distinguishes the facts in Future Focus Infotech and Cognizant Tech Solutions. When the personnel is supplied to the premises of client and the employees still remain in the payroll of appellant, would strongly indicate that there is no provision of MRSA services. From the discussions made by the original authority, it is seen that he is carried away by misconstruing the clarifications issued by the Board by Circular F. No. B1/6/2005-TRU dated 27.7.2005 wherein supplying staff / qualified personnel to the premises of the client would be supply of manpower. The

discussion in para 12.3 indicates that mere supply staff / qualified personnel to premises of client is construed as MRSA by the lower authority, which is erroneous. Even if parties agree that consideration will be based on the number of persons employed, what has to be looked into is whether the agreement is to execute the work for the client or merely supply the work force. What has to be examined is the core activity for which the agreement is entered between parties. The clients are not in IT related fields. They need services in the nature of annual maintenance of systems, testing, developing of software etc. The disputed transactions as per agreement do not reflect ingredients required for MRSA."

8. Regarding agreement with M/s FI Technologies, The Learned counsel for the Appellant submits that said Service was provided outside India. As per the terms of the agreement with FI Technologies, FI Technologies will collaborate and assist Sasken in Europe in marketing the services of Sasken to Semi-conductor customers. Further, as per the terms of the agreement with Companycare Communications Limited, the vendor will identify 12 important titles to Sasken in Europe and deliver 12 pieces of coverage (feature, news and comment) across the titles. As can be seen from the above, the services have been provided in Europe for the benefit of branches which are situated in Europe. In view of this, it was submitted that the services have not been received in India and accordingly, the appellant is not liable to pay service tax under reverse charge mechanism.

9. The Learned Chartered Accountant for the Appellant further submits that even if it is held that appellant is liable to pay service tax under reverse charge mechanism, the service tax paid by the appellant would have been available as CENVAT credit as such services would amount to input service used for providing the services to the overseas customer under the

Cenvat Credit Rules, 2004. Further, the said CENVAT Credit available to the appellant could have been claimed by it as refund in terms of Rule 5 of the Cenvat Credit Rules. Hence, there is no revenue loss to the Government. Thus, the entire exercise to demand the service tax under reverse charge mechanism in respect of the above mentioned transactions is revenue neutral and accordingly, no demand can survive in such a situation.

10. Regarding limitation, The Learned Chartered Accountant for the Appellant submits that; invoking extended period of limitation in appellants case is illegal and unsustainable. The show cause notice does not allege in any way as to how the appellant is guilty of any of the acts mentioned in Sec. 73(1) of the Act. The SCN simply states that details would not have come to the notice of the department but for the audit by the department and that the appellant has suppressed the facts and contravened the provisions of the of the Act. Moreover, SCN was issued after 4(four) years from the date of commencement of Audit. The department initiated the audit proceedings in 2007 and the appellant submitted the reasons for non-payment of service tax on certain domestic sales and also submitted the required documents;

10.1. Further they relied on the following decisions for the above proposition:-

- i. CC Mumbai Vs. MMK Jewellers 2008 (225) ELT 3 (SC) where it was held extended period of limitation cannot be invoked where show cause notice was issued after a period of two years from the date of stock verification.
- ii. CCEx. Vs. Pals Microsystems 2011 (270) ELT 305 (SC) wherein it was observed that where the premises of the assessee was visited by department earlier and show cause notice by invoking extended

period of limitation cannot issued after a period
Limitation

11. The Learned Chartered Accountant for the Appellant also submits that the SCN has been issued on 06.04.2011 for the period October 2005 to March 2007. While computing the demand of service tax, the department has considered the consideration received in respect of services provided on or before October 2005 but for which the payment has been received on or after October 2005. It is submitted that in terms of proviso to section 73(1) there is no power to the department to issue demand notice for the period beyond 5(five) years.

12. The Learned Chartered Accountant for the Appellant further submits that it was under a bonafide belief that the services provided by them are liable to be classified under 'Information Technology services' and not under 'Manpower supply services'. It is submitted that where the appellant acts under a bonafide belief, the extended period of limitation cannot be invoked. The appellant relies on the decision of the Hon'ble Supreme Court in Centre for Development of Advanced Computing Vs. CCE 2002 (141) ELT 6, wherein it was held that where assessee was under a bonafide belief, the larger period of limitation cannot be invoked on allegations of suppression. Further in Uniworth Textiles Ltd Vs. CCE 2013 (288) ELT 161(SC), it was held that if the assessee does not pay the duty due to bonafide belief, the larger period of limitation cannot be invoked.

13. Learned Authorised Representative submits that the issue is covered by the decision of the Hon'ble Supreme Court in the matter of **CC, CE & ST, Bangalore (Adjudication) Vs. Northern Operating System Pvt. Ltd.- 2022 (61) G.S.T.L. 129 (SC)**, where it is held that such service are said to have provided

manpower supply service. Learned AR also relied the following decisions.

- I. Future Focus Infotech India (P) Ltd Vs. CST 2010 (18) STR 308 (Tri. Chennai)
 - II. Future Focus Infotech India (P) Ltd Vs. CST 2013 (32) STR J234 (SC)
 - III. Future Focus Infotech India (P) Ltd Vs. CST 2018 (18) GLT 441 (Tri.Chennai)
 - IV. Cognizant Tech Solutions (I) Pvt Ltd Vs. Comm 2010 (18) STR 326 (Tri. Chennai)
 - V. Bharat Hotels Ltd. Vs. Comm. Of C.Ex (Adjudication) - 2018(12) G.S.T.L 368 (Del.)
 - VI. CC, CE & ST, Bangalore (Adjudication) Vs. Northern Operating System Pvt. Ltd.- 2022 (61) G.S.T.L. 129 (SC)
 - VII. M/s. Coromandel Infotech India Ltd. Vs. The Comm. Of GST & C.E, Chennai South Commissonerate. - 2019(1) TMI 323- (CESTAT,Chennai)
 - VIII. M/s. Talking Technology (P) Ltd. Vs. The Comm. Of Service Tax, Chennai -2020(3) TMI 315,CESTAT, Chennai.
 - IX. CC, CE & ST, Bangalore (Adjudication) Vs. Northern Operating System Pvt. Ltd.- 2022 (61) G.S.T.L. 129 (SC)
14. On rejoinder, Learned Chartered Accountant for the appellant also drew our attention to the judgment of Hon'ble Apex court in the matter of **CC, CE & ST, Bangalore (Adjudication) Vs. Northern Operating System Pvt. Ltd (SUPRA)**, and submits that the Hon'ble Apex court concluded the above finding upon an overall reading of the materials presented by the parties, discern the true nature of the relationship between the seconded employees and the assessee, and the nature of the service provided - in that context - by the overseas group company to the assessee. In appellant's case, adjudication authority itself admits that the agreement entered by Appellant with different customers are for the development of software, only. On the issue of

limitation Learned counsel for the appellant also drew our attention to the finding of the Hon'ble Apex court:-

"62. The revenue's argument that the assessee had indulged in wilful suppression, in this Court's considered view, is substantial. The view of a previous three judge ruling, in Cosmic Dye Chemical v. Collector of Central Excise [(1995) 6 SCC 117- 1995 (75) E .L.T.721 S.C.)] - in the context of Section 11A Excise Act, 1944, which is in identical terms with Section 73 of the Finance Act, 1994 was that:

"Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "willful" preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not willful and yet constitute a permissible ground for the purpose of the proviso to Section 11A. Misstatement or suppression of fact must be willful."

63. This decision was followed in Uniworth Textiles v. Commissioner of Central Excise [(2013) 9 SCC 753 = 2013 (288) E.L.T. 161 (S.C.)] where it was observed that "(t)he conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts" is "untenable". This view was also followed in Escorts v. Commissioner of Central Excise [(2015) 9 SCC 109 = 2015 (319) E.L.T. 406 (S.C.)], Commissioner of Customs v. Magus Metals [(2017) 16 SCC 491 = 2017 (355) E.L.T. 323 (S.C.)] and other judgments.

64. The fact that the CESTAT in the present case, relied upon two of its previous orders, which were pressed into service, and also that in the present case itself, the revenue discharged the later two show cause notices, evidences that the view held by the assessee about its liability was neither untenable, nor mala fide. This is sufficient to turn down the revenue's contention about the existence of "willful suppression" of facts, or deliberate misstatement. For these reasons, the revenue was not justified in invoking the extended period of limitation to fasten liability on the assessee."

15. Heard both sides and perused the records. We have gone through the submissions made by both and the agreements executed by the appellant with their clients. Regarding limitation, the show cause notice does not allege in any way as to how the appellant is guilty of any of the acts mentioned in Sec. 73(1) of the Act. The SCN simply states that details would not have come to the notice of the department but for the audit by the department and that the appellant has suppressed the facts and contravened the provisions of the of the Act. Moreover, SCN was issued after 4(four) years from the date of commencement of Audit. As per the judgment of Hon'ble Supreme Court in **CC, CE & ST, Bangalore (Adjudication) Vs. Northern Operating System Pvt. Ltd (SUPRA)**, for these reasons, the revenue was not justified in invoking the extended period of limitation to fasten liability on the assessee.

16. As regards, issue on merit, as per the agreement entered by Appellant with **M/s Texas Instruments(IT)**, objective of the project is to Design and develop OCL library, and OCL components

for Camcorder applications, Integrate and test OCL components with TJ's Codecs and other DSP/IVA Socket Nodes, Integrate and test OCL, library, and components with Sasken's Camcorder Application components. To complete the project, engineers of the Appellant will do the development and unit testing of OCL. Subsequently Sasken and TI engineers will jointly integrate OCL with TI's Codecs and other DSP/IVA Socket Nodes along with Sasken's Camcorder Application components. Sasken will provide a weekly project status report to track the progress of this project.

16.1. Similarly, as per the agreement with **M/s Samsung Electronics**, the scope of project is launching a 3G Handset in the US market. SAMSUNG has approached Sasken to provide services in Multimedia application development/ customization, integration, and testing, IMS client integration, Application testing of Applications, Protocol Testing and Camera Application development.

16.2. Similarly, purpose of the project between the Appellant and **M/s Nokia Corporation** defines the Development work, project organization and deliverables and other relevant issues related to the Development Work for NVO India Wireless Village Venture (WV) as well as perform such other services and duties set out in the main Agreement. The project target is to develop/enhance and test the WV system solution adhering to Nokia's product requirement Specification and Developments. In another agreement with **M/s Nokia**, it is specifically mentioned the purpose of the project order is for Software Development

Subcontracting in relation to MOF Desktop Project Offshore and Düsseldorf Onsite Development.

16.3. Similarly, the work order details with **M/s. Free scales semi-conductors**, appellant will deliver complete verification test plan and strategy with discussions with Freescale team members. Appellant will deploy the methodology to develop the designated test cases for relevant IPs. They must adhere to Freescale's coding standards and regression methodology as specified in the methodology documents and meet the schedule described herein after for completion of verification of IP modules prescribed. It is expected that Sasken engineers are familiar already with industry standard verification languages, coverage and assertion tools.

16.4. Further as per the terms of agreement with **M/s Philips Semiconductors**, Appellant will carryout Feasibility analysis of WMV9 on Philips platform. This will include analysis for achieving the required MIPS, code size, static data and dynamic data for following profiles and levels on Philips platform and a plan for optimisation.

17. Thus, in all the cases, we find that the agreements are for development of software and for that purpose, software engineers from the appellant are deputed to other companies or they have directed their employees to develop the software in their own premises. As held by the Hon'ble High Court of Karnataka in W.A No. 118-129/2011 in appellant's own case and considering the finding given by the Tribunal in **M/s Infotech Enterprises Ltd (SUPRA)**, even if billing is done based on the number of man

hours/man days, it should not be treated as manpower supply service. The real test of determining the nature of service is to go through the agreement to understand, what are the deliverables which the service provider has to deliver to the service recipient. In the present appeal, the deliverable service is the delivery of software services. Moreover, even if it is held that appellant is liable to pay service tax under reverse charge mechanism, the service tax paid by the appellant would have been available as CENVAT credit as such services would amount to input service used for providing the services to the overseas customer under the Cenvat Credit Rules, 2004. Further, the said CENVAT Credit available to the appellant could have been claimed by it as refund in terms of Rule 5 of the Cenvat Credit Rules, 2004.

18. On above grounds, demand made through impugned order needs to be set aside along with interest. Consequently, penalties imposed upon the appellants also need to be set aside.

19. In the facts and circumstances and the decisions on the issue, the Appeal is allowed with consequential relief, if any in accordance with law.

(Order pronounced in Open Court on 20.06.2024)

(P.A. Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

Sasidhar