CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH - COURT NO. 2

Service Tax Appeal No. 1356 of 2011

(Arising out of Order-in-Original No. 18/2011 dated 14.02.2011 passed by the Commissioner of Service Tax, Bangalore.)

ASM Technologies Ltd.
No. 80/2, Lusanne Court,
Richmond Road,
Bangalore – 560 025. .....**Appellant(s)**

Versus

The Commissioner of Service Tax,
No. 16/1, S.P. Complex,
5th Floor, Lalbagh Road,
Bangalore – 560 027. .....**Respondent(s)**

APPEARANCE:
Mr. N. Anand, Advocate for the Appellant.

Mr. M. A. Jithendra, Authorized Representative (AR) for the Respondent.

CORAM:
HON'BLE MR. P.A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE SMT. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 22058 /2025

Date of Hearing: 28.07.2025
Date of Decision: 04.12.2025

PER : P.A. AUGUSTIAN

The issue in the present appeal is whether the Appellant who had provided services to various IT companies is falling under the category of Manpower Supply, Commercial Training or Coaching Service, Information Technology Software service ...etc and if it is held that it is falling under above activities, whether Appellant is eligible to exclude the cost of reimbursable expenses. Issue involved in the present appeal

is for the period from 16.06.2005 to 31.03.2006 and from 19.04.2006 to 30.09.2009.

2. Based on the audit report, show cause notice dated 02.03.2010 was issued alleging short payment of service tax by invoking the extended period of limitation. Thereafter Adjudication authority as per order dated 14.02.2011 confirmed the proposal in the show cause notice. Aggrieved by said order, present appeal is filed.

3. When the appeal came up for hearing, the Learned Counsel for the Appellant submits that in the first-split period, the Appellant rendered software development and services in relation to information technology software services to its various customers as stated above. The Appellant in bona fide believed that software development and other IT software services rendered to customers in India being "information technology services" which was not taxable under any of the existing service category inasmuch as (i) "consulting engineer service as defined in section 65(31) r/w section 65(105)(g) of Finance Act, 1994 and the services in relation to 'computer software' was either exempted from payment of service tax vide notification No.4/99-ST dated 28.02.1999 which was in force upto 10.09.2004 or excluded from the "taxable service" definition in section 65(105)(g) post 10.09.2004 which was in force till 16.05.2008; (ii) definition of BAS in 65(19) of the Act excluded "information technology service" etc. Thus, till the Parliament enacted the Finance Act, 2008, the information technology service was never construed as taxable service u/s 65(105) of the Act. However, w.e.f.01.04.2006, the Appellant discharged service tax under the category of both "manpower supply services and also under "ITSS" wherever they had rendered services in relation to supply of manpower and also services in relation to ITSS. However, for the period from 16.06.2005 to 31.03.2006, the Appellant did not pay any service tax under the category of "manpower supply" as they believed that they did not render any services in relation to that category. For the second split period viz., 19.04.2006 to 30.09.2009, the Appellant did pay service tax

under the category of both "manpower supply services" and also under "ITSS" wherever they had rendered services in relation to supply of manpower and also services in relation to ITSS. However, in terms of the contract/agreement with the customers, the Appellant received certain "reimbursable expenses" like travel and conveyance expenses, meal expenses, VISA expenses reimbursement, etc., in addition to service charges. The Appellant paid service tax on actual service charges received by them (there is no dispute on this fact). However, they did not include "reimbursable expenses" in the value of service since during this period there was no requirement to include "reimbursable expenses" in the value of service under section 67.

4. As regarding the demand of service tax under manpower supply service, Learned Counsel submits that the demand is confirmed without considering the agreement, contract...etc entered by the Appellant with the customers and there is no finding as to how and what manner the Appellant had rendered manpower supply. The Learned Counsel further submits that the law is well settled that the burden of proof is on the Revenue to establish that the activity is taxable under particular head or another. In this regard Learned Counsel relied on the following decisions:-

i. **S.N.Uppar & Co Vs. CCE, 2008 (11) STR 34 (Tri-Bang.) affirmed by Hon'ble Supreme Court in 2016 (45) STR J215 (SC).**
ii. **United Telecom Ltd Vs. CST, 2008 (9) STR 155 (Tri-Bang.).**
iii. **UOI Vs. Garware Nylons Ltd., 1996 (87) ELT 12 (SC).**
iv. **Nanya Imports & Exports Enterprises Vs. CC, 2006 (197) ELT 154 (SC).**
v. **HPL Chemicals Ltd Vs. CCE, 2006 (197) ELT 324 (SC**).

5. The Learned Counsel also draw our attention to the amendment letter for agreement No. 4903IN0416 dated 31.03.2005 where scope of the work is defined as "under this SOW, supplier will provide the

software support development activities, including but not limited to, software development, software testing, publication development, maintenance, software development support or such other activities as may be defined by the buyer to the supplier in the relevant WM". Further as per clause 3.0 i.e., under Description of Developed Works And Related Deliverables and Services it is specified that the Services and Deliverables that may be required to be provided under this Agreement, either on Supplier's, Buyer's or Buyer's Customer's premises as specified in a Work Acceptance (WA) are comprehensive technical services. Accordingly. Supplier will provide a full range of technical personnel who possess Skills, for the following Skills References listed in 5.1. under Developed Works, it is specified that the Supplier agrees that all Deliverables, code or materials provided as part of the Services are Developed Works.

6. The Learned Counsel further draw our attention to Clause 6 where the suppliers responsibilities are stated as follows:-

> (a) The following measurements are key to the successful performance of work detailed in this Agreement. Buyer will use a quarterly average of the monthly scores to assign points. Buyer will measure Supplier's performance, on a semi-annual basis, using the Supplier Performance Report (SPR), including an annual Client Satisfaction Survey (based upon a sampling of requesters" feedback) to calculate an average score. In the event Supplier's total is in the top 70% of the total points including individual categories as prescribed by the Buyer in the SPR, Supplier will be considered for contract extension or renewal. Upon notification of a total score below 70% of the total points. Supplier will provide an action plan for improving performance at a national level. Such action plan will include a time frame for the successful execution of the plan. This action plan will be reviewed and approved by Buyer. Supplier's failure to successfully execute the action plan within the agreed upon time frame may result in the substantial or complete reduction of new business awards by Buyer.

Notwithstanding the measurements and subsequent assessments as described in these sections, the buyer retains the right to, from time to time, conduct assessments of the supplier's relative performance compared with other suppliers and implement changes to the supplier's status as a core or regional/niche supplier (including volume of business), based on such assessments or supplier's breach of any term of this agreement.

(b) In addition to these measurements of quality and performance against commitments in the following sections, Supplier will attain the objectives detailed in the Technology. Terms and Conditions, and Communications sections of the SPR. The SPR would also be assessing the Suppliers conformance to the Buyers' processes.

(c) This Section of the Agreement may be amended by Buyer from time to time to reflect changes in Buyer's business goals and objectives.

7. The Learned Counsel also draws our attention to Clause 6.2 where service warranty period is specified as follows:-

"6.2 Services Warranty Period: Supplier will provide a 30-working day warranty on Services. In the event Supplier's Personnel ceases performing under a WA issued against this SOW within the first 30 working days for any reason other than Buyer's termination without cause, Buyer will not be billed for Services performed within such 30 working day period. In addition, replacement Supplier's Personnel (following a Supplier's Personnel who left during the first 30 working days) will be non-billable during the period for which it takes them to become proficient as a replacement. up to 30 additional working days".

8. The Learned Counsel further drew our attention to master service agreement dated 18.04.2005 entered by the Appellant with M/s Philips Software Center Pvt. Ltd. where M/s. Philips is inter alia engaged in the business of developing hardware and software for consumer electronics, telecommunication equipment, and personal multimedia software and hardware. ASMTL has experience in developing software related to, among others, embedded software, device programming, functional

verification, system programming and multimedia. ASMTL has represented to Philips that it has sufficient expertise and resources to develop and provide the Services (as hereinafter defined) as more elaborately specified in the POs in connection with the development of various software/hardware applications. Philips desires to engage ASMTL from time to time to provide the Services. ASMTL has agreed to undertake such engagements and provide the Services as specified in this Agreement and in accordance with the relevant POs accepted by ASMTL. The Parties desire to enter into this Agreement for the purpose of setting out their mutual rights and obligations in relation to the Services to be provided by ASMTL, as shall govern the Parties from the date first above mentioned. As per the said agreement, services may be services to be provided by Appellant to M/s Philips under the agreement in connection with the projects including without limitation, the design, allotment, coding, testing, supply enhancement and maintenance of data and final production software/hardware application and other deliverables as specified in the individual peevers. As regarding cost, a fixed price, project means, project undertaken under the agreement for a fixed fee and under which the project is controlled by ASMTL, Appellant and deliverables as specified in the PO for the same. The Learned Counsel submits that as per the above said conditions, it is well settled that the activity or service rendered by the Appellant was not mere manpower supply but software development and or services in relation to ITSS. The Appellant is not engaged in supply of manpower. Hence the finding that the Appellant had rendered manpower supply is unsustainable.

9. The Learned Counsel further submits that when the Parliament specifically kept Information Technology service outside the scope of service tax, as evident from Finance Act, 1994 including consulting engineering service, BIS service and Information Technology service. Respondent is making an attempt to tax such exempted categories. The Learned Counsel further submits that one cannot read the agreement into bits and pieces. It is well settled that the contract/agreement has

to be read and interpreted in whole and not in bits and pieces. Reliance is placed on the judgment of the Honorable Supreme Court in **State of Gujarat v. Variety Body Builders, AIR 1976 SC 2108, 2110** wherein it is held that - "It is well settled that when there is a written contract it will be necessary for the Court to find out therefrom the intention of the parties executing the particular contract. That intention has to be primarily gathered from the terms and conditions which are agreed upon by the parties". Hence, the impugned order cannot be sustained. It is further submitted that the SCN has been issued entirely on the basis of presumptions and assumptions besides being vague and un-corroborative. The impugned order is also opposed to the decision in the case of **Oudh Sugar Mills Ltd v. UOI, 1978 (2) ELT 172 (SC).**

10. As regarding reimbursable expenses, the Learned Counsel submits that while assessing the service tax liability, the reimbursable expenses were also included in the value by invoking Rule 5 of the Service Tax (Determination of Value) Rules, 2005. The Appellant had received reimbursement of expenses as per agreement/contract towards travel, conveyance expenses, mail expenses, VISA expenses....etc which is reimbursable expenses. The issue is settled as per the judgment of the Hon'ble Supreme Court in the matter of **Union of India Vs. M/s Intercontinental Consultant & Technocrats Pvt. Ltd. (2018 (10) GSTL 401 (SC**) where it is categorically held that Rule 5 of the Service Tax (Determination of Value) Rules, 2005 is ultra-virus of Section 67 of the Finance Act, 1994 and therefore any expenditure incurred by the service provider such as travel, hotels, stay, transportation..etc in the course of providing service cannot be includable in the value of services as per Section 67 of the Act.

11. The Learned Counsel further submits that the demand is also barred by limitation. There is no willful suppression of fact or contravention of any provision of law with an intension to evade payment of service tax. The Appellant had bonafide believe that the activities are exempted from service tax liability, since it is falling under

the category of Information Technology services in relation to the computer software which was either exempted from payment of service tax or was excluded from the definition of taxable services. Hence the entire issue is based on the bonafide and genuine interpretation of the statutory provision regarding classification and on the reimbursable expenses as per the judgment of Hon'ble Supreme Court in the matter of **M/s Continental Foundation Joint Ventures Vs. CCE - 2007 (216) E.L.T 177 (SC) and CCE Vs. M/s Chemphar Drugs & Liniments - 1989 (40) E.L.T 276 (SC).** Accordingly, demand confirmed by invoking extended period of limitation and penalty are unsustainable.

12. The Learned Authorized Representative (AR) for the revenue reiterated the findings in the impugned order and also submits that the submission made by the Learned Counsel regarding non consideration of agreement by Adjudication Authority is unsustainable. The Learned AR also draw our attention to the Clause No.9 and 10 of the agreement where the rates are inclusive of all taxes including Service tax. All taxes, duties or fees of any nature whatsoever levied by any Government or Local authority in India on or pertaining to the work to be performed or materials supplied under this Agreement are to be borne and paid by the Supplier unless agreed otherwise in the PO or WA. Provided however that Buyer shall withhold any taxes leviable on the payments to be received by Supplier from Buyer for the work performed by Supplier hereunder according to the applicable tax laws and regulations. Further, as per the Clause 9.2., All tax or equivalent benefits would be accrued to Buyer and not passed on to the Supplier. As per clause 10.1, any project-related travel, within India / within country of assignment or to any location outside country of assignment but for duration less than 30 days, after beginning of assignment shall be reimbursed by Buyer as per IBM India travel policy. All such travel shall be with prior approval of concerned Project Manager and in line with the Purchase Order issued for the same. The reimbursement shall be against production of invoice accompanied by all supporting

documents such as original Bills/ticket jackets/Project manager approval. No other charges/fees will be paid apart from the ones mentioned in the Purchase Order. Further as per the definition in the said agreement, the supplier person means, suppliers employees including their suppliers' employees deployed against valid PO/work acceptance issued by buyer. Further submits that as evident from Clause 6.6.1 regarding Supervision of Supplier's Personnel, Supplier shall be solely responsible for consistent supervision of its personnel provided under this Agreement, at no additional cost to Buyer. Supplier's supervisor shall have full supervisory authority over all day-to-day employment relationship decisions relating to Suppliers' personnel, including those decisions relating to: wages, hours, terms and conditions of employment, hiring, discipline, performance evaluations, termination, counseling and scheduling. Supplier's supervisors at each work location will be responsible to know that work location's planned holiday (and other closing) schedules and the impacts all such schedules have on Supplier's Personnel. Supplier will conduct orientation sessions with its personnel before placement on an IBM assignment, during which orientation such personnel will be told who their supervisor is and how that supervisor can be contacted. Supplier will, from time to time, ensure that all of its employees working under this Agreement continue to be aware of this information. Further as per the reimbursement policy, it is very specifically stated that projects were SSPC are paid on hourly basis. The Learned AR further submits that the Tribunal in the matter of **M/s Coromandel Infotech India Ltd. Vs. Commissioner of GST & Central Excise, Chennai South Commissionerate – 2019 (1) TMI 323 - CESTAT Chennai**) has considered the issue whether the activities carried out by the Appellant which is utilized by software companies for development, implementation and maintenance of software projects are falling under the category of manpower supply and it is held that:-

"14. In the circumstances, we conclude that the demand of 95,68,100/- with interest thereon in respect of alleged Manpower Supply Services for the period June 2005 to 15.05.2008 will not

sustain even for the normal period on this score and will require to be set aside, which we hereby do. In consequence. the penalty of 95,68,100/- under Section 78 ibid will also get extinguished".

13. The Learned Authorized Representative (AR) draws our attention to Manpower Recruitment Services to their clients and therefore, the demand raised is legal and proper. The appellant replied to the Show Cause Notice and their contention that the split-up details of the demand is not provided, is incorrect. Ld. AR relied on the decision in the case of **M/s. Future Focus Infotech Pvt. Ltd. Vs. Commissioner of Central Excise (ST), Chennai-IV vide Final Order No. 41108/2018 dated 27.02.2018** and submits that the very same issue in the present appeal has been decided by the Tribunal in which it was held that such activities are exigible to service tax under the category of Manpower Recruitment Services. From the facts on record it is seen that the appellant had supplied personnel to M/s Infosys and other clients as per requirements of the latter. These personnel are utilized for development, enhancement, implementation and maintenance of software projects. It is also pertinent to note that such development, enhancement, etc., of software is not assigned to the appellants themselves, but is done only by M/s Infosys and the other clients. No doubt, the personnel so supplied may well be qualified software personnel Nonetheless, once such personnel have to function under the overall supervision, control and management of the client, the appellant is only providing services of Manpower Supply. The identical issue was addressed by other Bench in the case of **M/s. Future Focus Infotech Pvt. Ltd. (supra)** wherein this Bench after analyzing both the earlier decisions in **Cognizant Tech Solutions** (Final Order No 259/2010 dated 03.03.2010) and **Future Focus Infotech India (P) Ltd.** (Final Order Nos. 246-247/2010 dated 03.03.2010) came to the following conclusions:

"6.4 Thus, there are discernable differences in the facts of the dispute in respect of Tribunal decisions in the appellant's own case (Future Focus Infotech) and that in respect of Cognizant Tech

Solutions. The Tribunal has clearly found that Cognizant Tech. Solutions were themselves responsible for the development, information technology software etc., whereas in respect of Future Focus Infotech, that work is down only by TCS, Infosys etc. who have only obtained man power skill in information technology for such purposes. Hence the facts of Future Focus Infotech and Cognizant Tech. Solutions are definitely different. We are therefore not able to appreciate Id. Advocate's contention that the Tribunal has given contrasting decisions on same sets of facts in these cases.

……

6.8 We therefore find that even as per the facts, the appellants were only providing manpower, albeit those having software technology skills, to organizations like TCS, Infosys etc. But the information technology development was not done by the appellant themselves nor was it contracted to them. On the other hand, such software or IT development was done only by TCS, Infosys etc., by utilizing the man power supplied by the appellant and as per their requirements allocation and control.

6.9 Viewed in this light, we do not find any reason to deviate from the conclusions and decision taken by this Tribunal, in the appellant's own case, for an earlier period, in Final Order No. 246-247/2010 dt. 03.03.2010 in Appeal Nos. S/173/2008 & ST/220/2009 as reported in 2010 (18) STR 308 (Tri.-Chennai). We are therefore of the considered opinion that the activities of the appellant will definitely fall only within the scope of "Man Power Supply or Recruitment Agency Service as defined in Section 65 (105) (k) of the Finance Act, 1994. The appellants are therefore liable for discharging tax liability on the value of taxable services in respect of these services".

14. Heard both sides. As per the terms of agreement, we find that some of the agreements are applicable to manpower recruitment services. However, as per the judgment of Hon'ble Supreme Court in the matter of **Variety body builders (Supra),** it is settled that one cannot read agreement in bits and pieces but has to be read and

interpreted from intention of the parties executing the particular contract. Appellant being experience in developing software related embedded software devices programming functional verification etc., the agreements were executed for development of the activity and not an activity exclusively for supply of manpower. Further, we find that at the relevant time Information Technology services was outside the scope of Service Tax as evident from the provisions of Finance Act, 1994.

15. Fact being so, incorporating the activities under the category as done by Adjudication Authority beyond the scope of provisions of law. This Tribunal while considering the issue M/s. Future Focus Infotech Pvt Ltd has verified the agreement and categorically held that such activity is excisable to Service tax under the category of Manpower Recruitment Service. Since as per the facts on record it is evident that appellant had supplied personnel to M/s. Infosys and other clients as per the requirement of the letter, these personnels are utilized for development enhancement and implementation of maintenance software project. But while considering the issue in the matter of Cognizant Tech Solutions, it is distinguished on the ground that Cognizant Tech Solutions they themselves responsible for the development of Information Technology software services whereas in respect of Future Focus Infotech Pvt Ltd, that work is done by Tata Consultancy Services etc., who has only obtained manpower skills in Information Technology for such purpose. We have gone through the agreement and find that the deliverable services is delivery of software services and only with effect from 16.05.2008, parliament inserted new taxable service category ITSS under section 65 (105)(zzzze) and also made suitable amendment in the other service categories like consulting engineer, BIS, maintenance of repair and service etc specifically proved levy of service tax on the above category it is clearly established there was no intent on the parliament to impose and demand service tax in respect of Information Technology service prior to 16.05.2008. Accordingly, activities carried

out by the appellant cannot be classified under the category of manpower supply.

16. As regarding the classification of goods whether falling under manpower supply, this Tribunal has considered the issue in the matter of **M/s. Sasken Communication Technologies Pvt. Ltd. Vs. Commissioner of Service Tax, Bangalore – 2024 (22) Centax 264 (Tri. – Bang.)** were it is held that:-

> *"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 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".*

17. Further we find that the issue while considered by the Tribunal in the matter of **M/s Cognizant Tech Solutions (I) Pvt. Ltd. Vs. COMMR., LTU, Chennai (2010 (18) STR 326 (Tri. - Chennai**), it is held that:-

> *"10. We find force in the contentions made by the appellants that the work force recruited and retained by the appellants are required to work under a project manager appointed by the appellants who has to act as single point of contact being responsible for overall management of the project. From the arguments advanced from both sides, it is clear that the*

learned special counsel for the Department is not disputing that in the second stage of the project, the appellants would be providing functional service to Pfizer. It is also not in dispute that such functional service relating to data management, bio statistics and reporting will be provided through the very same manpower which has been recruited, retained and trained during the first phase. It has to be appreciated that recruitment and training precedes provision of specialized services. If it is accepted that the same manpower will be providing specialized functional services to Pfizer in the second phase of the contract, it is logical to conclude that the manpower has been retained with the appellants during the first phase and not supplied to Pfizer though recruitment of manpower has no doubt been done at the instance of Pfizer. The assistance in recruitment provided by Pfizer to select suitable personnel and subsequent training provided by Pfizer is also understandable considering the strict standards Specified by FDA of USA, the export market for the pharmaceutical products of Pfizer. The assistance in recruitment and imparting of specialized training for the recruited personnel cannot be held against the appellants' claim that they have not supplied the manpower but have merely recruited and retained the same for providing specialized services to Pfizer utilizing such manpower. "Moreover, we find that the nature of services required to be provided by the appellants are in the nature of information technology services as the same relates to data management. Consequently, we hold that the appellants are not liable to pay Service tax in respect of the services provided by them to Pfizer under the impugned contract. Therefore, we also hold that they are eligible for the small scale exemption in respect of the small value of services provided by them to M/s. SAP LABS India Pvt. Ltd. which is below the exemption limit of Rs. 4 lakhs".

18. Moreover, we find that the nature of services required to be provided by the Appellant are in the nature of Information Technology Services as the same relates to data management. Consequently we hold that Appellant are not liable to pay service tax in respect of services provided by them to PEFZER under the impugned contract. Therefore, we also hold that they are eligible for the small scale exemption in respect of...As regarding reimbursement of expenses, we find that the issue is squarely covered as per the judgment of the

Hon'ble Supreme Court in the matter of **M/s Continental Foundation Joint Ventures (supra)**.

19. As regarding the pleading in respect of reimbursable expenses, we find that demand was made by invoking by Rule 5 of Service Tax (Determination of Value), Rules, 2006. This issue is no more res integra, considering the judgment in the matter of **Union of India Vs. Intercontinental Consultant Technocrat Pvt Ltd,** no service tax can be demanded on the reimbursable expenses.

20. Accordingly impugned order confirming the demand and penalty is set aside and the appeal is allowed with consequential relief if any in accordance with law.

(Order pronounced in Open Court on 04.12.2025)

(P.A.AUGUSTIAN)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

Sasi/hr