

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
SCO 147-148, SECTOR 17-C, CHANDIGARH-160017

DIVISION BENCH

Court-I

**Appeal No.ST/918/10,349/11,770/12 & 60226/13-Cu
(DB)**

(Arising out of OIO No.05/Commissioner/10 dt.2.3.2010, OIO
No.23/Commissioner/10 dt.30.11.2010, OIO
No.35/Commissioner/2011-12 dt.2.3.2012 and OIO
No.46/Commissioner/13 dt.30.7.2013 passed by the CCE & ST,
New Delhi)

Date of hearing/Decision:28.08.2018

**M/s. Nestle India Ltd.
Vs.**

Appellant

CCE & ST, LTU, Delhi

Respondent

Present for the Appellant: Shri B.L.Narsimhan, Advocate
Present for the Respondent: Ms.Seema Arora, AR

**Coram: Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr.Anil G.Shakkarwar, Member (Technical)**

FINAL ORDER NO.63260-63263/2018

PER: ASHOK JINDAL

These appeals have been filed against the impugned orders wherein the demands of service tax have been confirmed against them along with interest under reverse charge mechanism and various penalties have also been imposed on them.

2. The brief facts of the case are that the appellant is registered with Service Tax Department for providing various services in India. It was observed during the course of audit that during the period 01.01.2005 to 30.04.2011, the appellant has not discharged service tax liability in respect of expenses made by them for

various services under an agreement entered into with M/s. Globe Centre, a division of Nestle Australia under reverse charge mechanism. Therefore, the proceedings were initiated against the appellant and demands of service tax have been confirmed along with interest and various penalties have also been imposed on them by way of various impugned orders. Against those orders, the appellants are before us.

3. Heard the parties.

4. We find in this case various services are in dispute, therefore, each service is to be taken separately to decide the issue.

(1) The demand for the period 01.01.2005 to 30.04.2011 has been confirmed under the category of Online Information and Data base Access & Retrieval service for which they have entered into an agreement with M/s. Globe Centre, a division of Nestle Australia to share expenses towards establishing and maintaining a SAP software system providing standardized information infrastructure.

4 (1) (i). The contention of Ld. Counsel for the appellant is that the said service covered by the decision of this Tribunal in the case of United Telcom Limited -2009 (14) STR 212 (Tri.-Bang.) which has been affirmed by Hon'ble Karnataka High Court reported in 2014 (33) STR J193 (Kar). The same view has been followed by this Tribunal in the case of State Bank of India- 2015 (37) STR 340 (Tri.-Mum.) and BASF India Ltd.-2018-TIOL-1744-CESTAT-Mum. It is his contention that online information and data base access and retrieval means providing data or information, retrieval or

otherwise to any person in electronic form through a computer network. No data can be retrieved or access by any person. In that circumstance, the service received by the appellant does not qualify as service in terms of Section 65 (75) of the Finance Act, 1994. Therefore, the appellant is not liable to pay service tax on the said service.

4 (1) (ii). On the other hand, Ld.AR submits that as per agreement, the appellant together with other Nestle affiliates obtained right to use SAP software. Nestle S.A. further developed this software to form the globe Template and made it available to the appellant under the General License Agreement. The Globe Template had been developed to ensure that the appellant has harmonized business process architecture, standardized master data and a standardized information infrastructure. The appellant had agreed to install the Globe Template in a common computer system and the appellant had been granted access to the computer system for its use. The Data Center of the Globe Center in Australia, will be the location of the Globe Template which the appellant will be able to use and access. Therefore, the appellant is liable to pay service tax under the category of online information and database access and retrieval service.

4(1) (iii). We have gone through the terms of agreement. As per the agreement, the appellant together with other affiliates of Nestle obtained right to use SAP software, which Nestle further developed this software to form the Globe Template and made available to the appellant under the General Licence Agreement. The Globe

Template has been developed to ensure that the appellant has harmonized business process architecture, standardized master data and a standardized information infrastructure. The appellant had agreed to install the Globe Template in a common computer system and the appellant had been granted access to the computer system for its use. The appellant can only access its own data and the data and information on the computer system belongs to the appellant and is neither owned nor provided by Globe Center. In that circumstance, the services in question do not qualify as "online Information and data base access and retrieval service". Therefore, relying on the decision of this Tribunal in the case of BASF India Ltd. (supra) wherein this Tribunal has held as under:

5. Accordingly, in the absence of any acceptable evidence that the assessee had access to data of others on the common server for which consideration was made over on which they are liable to tax under Section 66A of Finance Act, 1994, the charging of tax on the respondent would not be correct in law. For the above reasons, we find no reason to interfere with the impugned order."

8. Further, we find that the same view has been taken by Hon'ble Karnataka High Court in the case of United Telcom Limited (supra), wherein the Hon'ble High Court has observed as under:-

"Appellate Tribunal in its impugned order had held that appellant provided Wide Area Network (WAN) to Andhra Pradesh Government connecting all Government offices in State capital and District Centres for which equipments like network interfaces provided and ensured effective working of ports. Flow of information from different Centres to Headquarter and vice versa cannot be equated to online information and data retrieval. It was further held that private network service like WAN covered under Telecommunication Service introduced from 1-7-2007 and not covered under Online Information and Database Access or Retrieval service. Demand and penalty set aside."

Therefore, we hold that the appellant is not liable to pay service tax under reverse charge mechanism.

(2) The demand of Rs.13,81,919/- has been confirmed under the category of Manpower Recruitment or supply Agency service on the premise that the appellant has incurred expenses in foreign exchange largely in relation to bonus, medical expenses and school fees, for employees of other Nestle Affiliates with whom the appellant has entered into employment contract.

4(2) (i). We find that the appellant is not Manpower Recruitment or supply Agency and the amount paid to the affiliates for the benefit of the appellant's own employees, is not to be treated as consideration towards providing manpower recruitment and supply agency service. Therefore, we hold that the demand is not sustainable as held by the Hon'ble Gujarat High Court in the case of Arvind Mills Ltd.-2014 (35) STR 496 (Guj.), wherein the Hon'ble High Court has observed as under:-

"6. *We have to examine the definition of Manpower Supply Recruitment Agency in background of such undisputable facts. The definition though provides that Manpower Recruitment Supply Agency means any commercial concern engaged in providing any services directly or indirectly in any manner for recruitment or supply of manpower temporarily or otherwise to a client, in the present case, the respondent cannot be said to be a commercial concern engaged in providing such specified services to a client. It is true that the definition is wide and would include any such activity where it is carried out either directly or indirectly supplying recruitment or manpower temporarily or otherwise. However, fundamentally recruitment of the agency being a commercial concern engaged in providing any such service to client would have to be satisfied. In the present case, facts are to the contrary."*

Admittedly, appellant is not Manpower Recruitment or supply Agency, therefore, the appellant is not liable to pay service tax under reverse charge mechanism.

(3) The demand of Rs.17,71,200/- has been confirmed under the technical testing service for sample dispatched of its product and raw materials to laboratories located outside India for analysis and testing making report available to the appellant. The whole of the demand pertains to the period 1.1.2005 to 17.4.2006.

4 (3) (i). We find that the decision of the Hon'ble Bombay High Court in the case of Indian National Ship-owners Association vs. Union of India-2009 (13) STR 235 (Bom.) which has been affirmed by the Hon'ble Supreme Court reported in 2010 (17) STR J57 (SC) has observed that prior to 18.4.2006, no service tax is payable by the recipient located in India on the service received from abroad under reverse charge mechanism. As the period pertains prior to 18.4.2006, therefore the demand is not sustainable and the same is set aside.

(4) With regard to the demand of Rs.76,820/- has been confirmed under Commercial Training or Coaching service.

4(4) (i). We find that the appellant received books from M/s. Competitive Dynamics and SGV Development, which is sought to be taxed in the present proceedings. Further amounts were remitted abroad towards training of employees outside India. Mere supply of reading material cannot be equated to postal coaching. Further training services for employees were rendered outside India

and not taxable as import of service. Services, if any, having been performed outside India, cannot be taxed in India in view of the decision of this Tribunal in the case of Cerebral Learning Solutions Pvt.Ltd.-2013 (32) STR 379 (Tri.-Del.) wherein this Tribunal has observed as under:-

"4. The genesis of this avoidable lis could be traced to Circular No. 59/8/2003-S.T., dated 20-6-2003. The relevant legislative provision and the exemption granted vide Notification No. 12/2003-S.T., dated 20-6-2003 admit of no ambiguity. It is the admitted factual scenario that the assessee had provided the taxable service of Commercial Training and Coaching qua Section 65(165)(zzc) read with Section 65(26) and (27) of the Act. Section 67 of the Act enjoins that the gross amount charged by the taxable service provider/assessee on the taxable service. Accordingly, the value of the books or course material supplied by the assessee to its students/trainees is required to be included in the value of the taxable service as the gross amount charged by the service provider. The assessee however relied on the Notification dated 20-6-2003, issued by the Central Government in purported exercise of its powers under Section 93(1) of the Act. Under this general exemption notification, the Central Government exempted "so much of the value of all the taxable services, as is equal to the value of goods and material sold by the service provider to the recipient of service, from the Service Tax leviable thereon under Section 66 of the Act" subject to the condition that there is documentary proof specifically indicating the value of the said goods and services and subject to the other eligibility criteria specified in clauses (a) and (b) thereunder. That the assessee had furnished documentary proof indicating a separate value of the course material and text books supplied by it and that the assessee is entitled on this account, exemption under the Notification, is not in dispute. What has triggered Revenue's demand for service tax on the value of the course material and text books, is a Board Circular dated 20-6-2003 which seeks to "clarify" that in case of commercial training and coaching institutes, the exclusion shall apply only to the sale value of standard text books which are priced and that any study material or written text provided by such institute as part of service, which does not satisfy the above criteria will be subjected to Service Tax."

4(4) (ii). Therefore, we hold that the appellant is not liable to pay service tax the category of Commercial Training or Coaching service.

(5) Another demand of Rs.718029/- has been confirmed under the category of Online Information and Data base Access & Retrieval service paid for internet charges.

4 (5) (i). We find that the appellant has availed leased line services from Equant Network Services Ltd, a global network connectivity provider to communicate with Nestle Environment and outside. The services provided to the appellant is only for connectivity between two places and therefore, in the absence of provision of data or information, internet charges cannot be liable to tax under the category of Online Information and Data base Access & Retrieval service as held by this Tribunal in the case of State Bank of India (supra) wherein this Tribunal has observed as under:-

"9. If we examine the case vis-à-vis the coverage of Section 65(105)(zh), here again the department is on a weak footing. The very description under the contract between SBI and Equant shows that Equant IP VPN is a managed network service that provides secure IP internet working which enables connectivity. The IP VPN network does not allow customers routers in different VPNs to connect with one another. Therefore, it is clear that the said VPN does not provide connectivity between SBI domestic office and the SBI foreign office. Further, on going through the definition in Section 65(75) it is seen that the same describes the service to be "providing data or information retrieval or otherwise to a customer." In the present case, it has nowhere been disputed by revenue that the data centre is located abroad to which the foreign offices have access for data and its retrieval. The ownership of data is quite clearly with the SBI foreign offices. Equant have not provided any data for access/retrieval. They have simply

enabled the connectivity. They have provided connectivity which enables the FOs to access/retrieve data online. The responsibility of Equant is to ensure that network VPN functions properly. The Commissioner has totally misread the meaning of "Service provided in relation to online information and database access or retrieval". The words "in relation" qualify "information and database access or retrieval". Clearly the service provided has to relate to information access/retrieval. And Equant has not provided information and database. The ownership of data is with the FOs. This is a vital fact. The Commissioner's finding that it is not necessary that the original data should emerge or originate from the provider of VPN network is an incorrect reading of Sections 65(75) and 65(105)(zh). It would be pertinent to refer to another taxable service on the telecommunication service under Section 65(109)(a) brought into effect on 1-7-2007 which means "service of any description provided by means of a transmission, emission or reception of signs, signals, writing, images and sounds or intelligence or information of any nature, by wire, radio, optical, visual or other electro-magnetic means or systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception by a person who has been granted the licence under the first proviso to sub-section (1) of Section 4 of the Indian Telegraph Act, 1885 and includes — data transmission services including provision of access to wired or wireless facilities and services specifically designed for efficient transmission of data." The service provided by Equant will more aptly fall under telecommunication service if provider is licensed under Indian Telegraph Act. Reliance is placed on the case of *United Telecom Ltd.* (supra). However, the provider of telecommunication service would be Equant but this is not the subject matter of the present dispute."

Therefore, we set aside the above demand.

(6) The demand of Rs.4,798/- has been confirmed under the category of club or association service for the period 16.6.2005 to 17.4.2006.

4(6) (i). We find that prior to 18.4.2006 any service received from outside India is not taxable under the reverse charge mechanism in view of the decision of the Hon'ble Bombay High

Court in the case of Indian National Ship-owners Association (supra), the demand confirmed under the category of club or association service is not sustainable against the appellant and the same is set aside.

(7) The demand of Rs.8,97,936/- has been confirmed under the category of advertising and advertising agency for the period 1.1.2005 to 17.4.2006.

4 (7) (i) We find that the demand has been confirmed for the period 1.1.2005 to 17.4.2006 under the reverse charge mechanism prior to 18.4.2006, therefore, the said demand is not sustainable against the appellant in view of the decision of the Hon'ble Bombay High Court in the case of Indian National Ship-owners Association (supra).

(8) The demand of Rs.2,16,768/-- has been confirmed under software maintenance for the period 1.1.2005 to 31.12.2007.

4 (8) (i). We find that the appellant has procured software packages for its accounts department, human resource, enterprise resource planning, maintaining consumer complaint and licence of Microsoft Software and incurred expenses for use and their maintenance. As per circular No.70/19/2003 dt.17.12.2003, maintenance of software cannot be taxable to service tax as repair and maintenance as software is not goods. Software is a part of computer system and would therefore be covered by the circular. Therefore, any service rendered outside India is not taxable in India. The same view has been taken by this Tribunal in the case

of Jonson & Johnson Pvt.Ltd.-2017 (52) STR 159 (Tri.-Mumbai), wherein this Tribunal has observed as under:-

"13. Demand has been raised in respect of Management, Maintenance or Repair services in respect of SAP software which is maintained by service provider out of India. It is seen that the issue has been examined in detail in the decision of the Tribunal in the case of Persistent System Ltd. (supra). In the said decision, it has been held that while canned software can be treated as goods the customer specific software would be classified as Information Technology software. Since SAP is customer specific software, the decision in Persistent System Ltd. (supra) would be applicable in the case. Accordingly, service tax can only be demanded on the service received w.e.f. 16-5-2008. The demand and penalties in respect of services received prior to 16-5-2008 are set aside."

Therefore, we hold that the demand is not sustainable and the same is set aside.

(9) The demand of Rs.6,28,989/- has been confirmed under management consultancy service for the period 1.1.2005 to 10.5.2007.

4 (9) (i) We find that appellant has incurred expenses to students of Switzerland who undertake studies on how to improve the productivity of milk and come for training and provide advice to mil farmers. The said activity of providing assistance or advice in respect of technical aspects of production would not be covered under the definition of 'management consultant. Similarly, these students are not managing the appellant's organization as they have to do nothing with management of organization. In that circumstance, no service tax is payable under management consultancy service. We find that prior to 18.4.2006, therefore, the said demand is not sustainable under the reverse charge

mechanism against the appellant in view of the decision of the Hon'ble Bombay High Court in the case of Indian National Ship-owners Association (supra).

(10) The demand has been confirmed under consultancy engineer services for the period 1.1.2005 to 31.12.2008.

4 (10) (i). The visiting fees paid by the appellant for providing services in India and outside India.

4 (10) (ii). We find that the expenses incurred towards licence renewal of job evaluation system to reward technologies Pty Limited and for spares paid to Gambo B.V. which cannot be categorized under consultancy engineer services, no service tax is payable by the appellant.

(11) The demand has been confirmed on account of misc. expenses for the period 1.1.2005 to 31.12.2008.

4 (11) (i). We find that the appellant has incurred miscellaneous expenses in convertible foreign exchange which includes legal charges, courier charges, import of product samples, book, charges for damages goods exported, entertainment expenses abroad, membership fees, etc.

4(11) (ii). We find that the show cause notice has not indicated the specific category of taxable services under which the said amount is taxable. In that circumstance, no service tax is payable by the appellant. Moreover, the services provided outside India

and for the services rendered outside India no service tax is payable in India.

(12) The demand has been confirmed on account of market research agency service for the period 1.1.2005 to 31.12.2008.

4(12) (i). We find that since no payment has been made by the appellant, no service tax is payable by the appellant under reverse charge mechanism and service tax is payable only on receipt of remuneration. Therefore, we hold that no service tax is payable by the appellant.

5. In view of above analysis, we hold that no demand is sustainable against the appellant under reverse charge mechanism for the services rendered outside India and no service tax is payable by the appellant as discussed hereinabove.

6. In the result, the impugned orders are set aside and the appeals are allowed with consequential relief, if any.

(Operative part of order pronounced in the court)

(ANIL G.SHAKKARWAR)
MEMBER (TECHNICAL)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

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