CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI

Appeal No.ST/715/2010

[Arising out of Order-in-Original No.8/2010-S.Tax/Ch.IV dt. 16.08.2010 passed by the Commissioner of Central Excise, Chennai]

Six Sigma Soft Solutions (P) Ltd. Appellant

Versus

Commissioner of Service Tax,
Chennai Respondent

Appearance:

Shri G.Natarajan, Advocate
For the Appellant

Shri K.P.Muralidharan, AC (AR)
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S. Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 06.03.2018

FINAL ORDER No. 40927 / 2018

Per Bench

M/s.Six Sigma Soft Solutions (P) Ltd., the appellants herein, were providing technically qualified employees / man power to IT companies like TCS, Infosys for development of software projects. Department took the view that this activity would come within the fold of “Manpower Recruitment and Supply Agency Services”. Accordingly, a show cause notice dt. 10.10.2008 was issued to appellants inter alia, demanding service tax of Rs.1,30,78,744/- with interest thereon and also proposing imposition of penalties under various provisions. Subsequently, two more show cause notices were issued as under :

<table>
<tr><th>S. No.</th><th>SCN No.</th><th>Period</th><th>OIO</th><th>ST Amount (Rs.)</th><th>Penalties imposed in the order</th></tr>
<tr><td>1.</td><td>275/08 dt. 10.10.08</td><td>16.05.2005 to 31.03.2008</td><td rowspan="3">8/2010 dt. 16.08.2010</td><td>1,34,07,471/-</td><td>Rs.1,34,07,471 (Sec.78)</td></tr>
<tr><td>2.</td><td>50/09 dt. 16.03.09</td><td>01.04.2008 to 15.05.2008</td><td>9,93,474</td><td rowspan="2">Rs.200/- per day / 2 % pm whichever is higher (Sec.76)</td></tr>
<tr><td>3.</td><td>513/09 dt. 19.10.09</td><td>16.05.2008 to 31.03.2009</td><td>29,17,874/-</td></tr>
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These notices were adjudicated together culminating in a common Order-in-Original No.8/2010-S.Tax/Ch.IV dt. 16.08.2010 (impugned order), which upheld the demand of service with interest as proposed in the SCNs and also imposed penalties under Sections 76 & 78 of the Finance Act, 1994. Hence this appeal.

2. Today when the matter came up for hearing, on behalf of the appellant, Ld. Counsel Shri G. Natarajan made oral and written submissions which can be broadly summarized as under :

i) The main activity of the appellant involved entering into agreement with various software companies for undertaking various software related services such as design and development of software, as per the Task Order assigned or the Projects allotted by the clients from time to time. For this purpose, the employees of the appellant would be assigned either to such software companies' premises or to the premises of the ultimate clients, where the actual project is being undertaken. The appellant during the material period have been rendering such services to clients such as TCS, INFOSYS, etc, based on bipartite agreements, entered into from time to time, for provision of software services at the client's premises.

ii) The subject matter of the dispute revolves around classification of the services provided by the appellant to M/s.Tata Consultancy Services (TCS) and M/s.Infosys Technologies Ltd. (Infosys), in terms of the agreements entered into with them. During the initial period, the software projects obtained by TCS, would be sub-contracted to various sub-contractors like the appellant, on a case to case basis. A Business Associate Agreement, dated 04.12.2007 was entered into between the appellant and TCS, a copy of which is available in Page 1 of Volume II of the paper book. Similarly, a Sub contracting agreement dated 13.01.2006 has been entered into between the appellant and Infosys, a copy of which is available from page No.16 of Volume II of the paper book. In pursuance of this agreement, individual Task Orders would be issued to the appellant on a case to case basis. These were time and again renewed / redrafted.

iii) These activities cannot be considered as mere Manpower Recruitment and Supply Agency Service and should correctly be classified only under Information Technology (IT) services which came into force only w.e.f. 16.05.2008.

iv) The Commissioner has not taken into account their submissions made in the reply to the SCN that the demands in the list also cover the services rendered by them to M/s.Saudi Business machines Ltd. who were situated outside India, hence the services would qualify as export of services as per the provisions of Export of Service Rules, 2005. Ld. Advocate took us to page 92 of the Vol-I to highlight that this submission has been made in the reply to the SCN.

v) Ld. Advocate also made forceful plea on limitation. He submits that during the entire period of dispute, the other service providers to TCS / Inforsys like appellant were not discharging their tax liabilities and there were under the bonafide belief that their activity was only of IT services and therefore no tax liability would arise.

vi) Ld. Advocate further points out that even if the five year extended period is held as correctly invoked, even then tax demand pertaining to the period 1.4.2005 to 15.6.2005 cannot sustain since during that period there was no levy of man power supply agency service.

vii) Though part of these services were provided to SEZ units, Commissioner has not considered their submissions on this account and have dismissed their pleas without justification.

viii) Ld. Advocate finally submitted that only due to their bonafide belief that the services were not taxable, they had not at all collected any tax from their clients. Therefore, even if the matter is decided against them, he prays that they should be extended the benefit of cum tax benefit and tax liability may be recalculated accordingly.

3.1 On the other hand, Ld. A.R Shri K.P.Muralidharan submits that agreements entered into by the appellants with TCS and Infosys will clearly indicate that services provided were only supply of man power; that appellants were not themselves developing software nor they were exclusively involved in IT services.

3.2 Ld.A.R also relies upon the ratio of the case law in *Future Focus Infotech India (P) Ltd.Vs CST Chennai* – 2010 (18) STR 308 (Tri.-Chennai) where identical activity provided by the appellants therein had been held to be falling within the scope of Manpower Recruitment or Supply Agency Service.

4. Heard both sides and have gone through the facts.

5. The matter that comes up for decision concerns whether the activities of appellant would fall within the scope of "Manpower Recruitment and Supply Agency Service" or whether it can be said that they provide Information Technology (IT) service.

6.1 Various agreements in Vol-II of the appeal have been gone through. These agreements indicate that services provided by the appellants were supply of technically qualified man power to TCS, Infosys etc. For example, in the agreement dt. 4.12.2007 on page 3 of Vol-II, it is mutually agreed upon that appellant would provide selected employees to work on the computer software application development of specific projects to be identified and allocated by TCS at the sole and absolute discretion of the latter; to carry out such functions and project related activities as may be allocated by TCS on a fixed man month basis under overall guidance and supervision of TCS. So also, in the agreement dt. 13.01.2006 with Infosys seen on page 3 of Vol-II of appeal book, it is laid down that appellant would perform and deliver services under task orders. The “Task Order” as defined in clause 1 (h) of the Agreement means any statement of work expressly referring to issued under the agreement. The payment terms mentioned in page 29 of the paper book reveals that it would be based on number of days of services provided by the consultant for the services. From the above analysis, it is abundantly clear that appellant was involved only in supply of man power to TCS, Infosys etc. Such man power may well have been technical personnel and highly qualified in information technology too. But the fact remains that such personnel were only supplied by appellant to Infosys etc. And that they were required to function under supervision of the latter and as per the work allocated by these service recipients.

6.2 We find that the facts are very much *pari materia* with the facts of *Future Focus Infotech India (P) Ltd.Vs CST Chennai* – 2010 (18) STR 308 (Tri.-Chennai), wherein the Tribunal has clearly laid down that appellants therein had undertaken only supply of skilled man power. The relevant portion of the said order is reproduced below for ready reference :

> **“12.** We find that the arguments advanced on behalf of the appellants are mainly based on the various clauses in the agreements executed between them and their clients namely TCS and Infosys. We are of the

> view that not only the wordings of these clauses are to be considered but also how different clauses of the contracts actually operate have to be seen. We find that the appellants are supplying various skilled personnel to TCS and Infosys to work on software projects undertaken by TCS and Infosys from their respective clients. The personnel deputed by the appellants appear to be working at the site of the clients of TCS and Infosys or in the premises of TCS and Infosys. There is no evidence produced before us to indicate that any of the software projects undertaken by TCS and Infosys from their respective clients has been sub-contracted to the appellants or that the appellants are working on any such project on their own. What has emerged clearly is that the appellants have deputed skilled personnel including computer engineers to work under the supervision and control of TCS and Infosys personnel in-charge of projects undertaken by TCS and Infosys. The appellants are getting paid in terms of the man hours for the persons deputed to work under the control and supervision of TCS and Infosys.
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> **13.** No doubt there are clauses relating to deliverables and quality of work in the contracts but these by themselves do not indicate that the appellants are providing information technology software services to TCS and Infosys. Any person or organization obtaining skilled personnel has to ensure that such men deliver work of standard quality. No one would employ a person who is not skilled enough and no one would pay for shoddy work even if done by a skilled man. The relevant clauses in the contract in this regard on which much emphasis was sought to be put by the learned senior counsel for the appellants have to be viewed in the light that TCS and Infosys are merely seeking to obtain personnel from the appellants with necessary skill who will work diligently on the projects undertaken by TCS and Infosys."

6.3 We do not find any new facts or evidence requiring a deviation from the ratio laid down by the Tribunal in the *Future Focus Infotech India* decision (supra). Accordingly, we hold that there is no infirmity in the impugned order concluding that the activity of the appellant would fall within the fold of "Manpower Recruitment or Supply Agency Service" under Section 65 (105) (k) of the Finance Act, 1994. So ordered.

6.4 However, we find merit in the contention raised by the ld. Advocate that the adjudicating authority has not considered submissions, on non-taxability of such services when provided by them to clients outside India and to SEZ units. We further note that the contentions of the appellant that services provided to SEZ units would be exempt vide Notification No.4/2004-ST have been brushed aside by the Commissioner on vacuous grounds such as "*verifications made by the field formations reveal that specific queries were not answered by Six Sigma*" and that "*certificates from the SEZ show the service providers as Tata Consultancy Services and not M/s.Six Sigma Soft Solutions Pvt. Ltd.*" . We are at a loss to fathom why adjudicating authority requires the SEZ certificates to certify name of appellant. Once it is confirmed that recipient unit is a SEZ unit and other procedural requirements and conditions of the Notification No.4/2004-ST have been fulfilled, notification benefit to taxable value involved in such services, should not be defined for flimsy reasons.

6.5 Ld. Advocate has been at pains to point out that there was no malafide intention on the part of the appellant. He has contended they were under the impression that the said activities would come within the scope of IT services, hence not taxable. For this reason, ld.

Advocate has contended that extended period of time would not be invokable. However, we find that the adjudicating authority has addressed this aspect in para-10 of the impugned order, where it has been brought to the fold that appellant had not at all disclosed the receipt of income in respect of the activities done by them in respect of services provided by them in their ST-3 returns.

6.6 The facts came to light only when the department conducted scrutiny of the annual reports, possibly during audit. In such circumstances, the department is fully justified in invoking the extended period of limitation of five years. At the same time, we find merit in the Ld. Advocate's submission that while the demand has been made from 16.6.2005, for the period 1.4.2005 to 15.6.2005 the demand is erroneous since the impugned Manpower Recruitment of Supply Agency Services was made taxable only w.e.f. 16.5.2005. So ordered.

6.7 We also find merit in the plea for grant of cum tax benefit as there is no allegation that appellants have collected tax from their clients. We therefore hold that there is a case for grant of cum tax benefit.

6.8 Coming to the issue of penalty, benefit of doubt can be given to the appellant that they were under bonafide belief that no tax is required to be deposited by them on the services provided. Ld. Advocate has also pointed out that they had obtained a clarification from their client TCS, one of the reasons why they did not discharge the liability. These facts, in our view, are valid reasons and appellant had reasonable cause for their failure to discharge tax liability. Hence we hold that provisions of Section 80 of the Finance Act can be invoked and penalty imposed under Sections 76 & 78 can be set aside. So ordered.

7. In the event, we hold and order as under :

(a) The services provided that appellant fall within the category of Manpower Recruitment or Supply Agency Service. The order of the adjudicating authority on this score is upheld.

(b) The penalties imposed under Sections 76 & 78 of the Finance Act, 1994 are set aside.

(c) The matter is remanded to the adjudicating authority for the following purposes :

(i) to recalculate the tax liability from 16.6.2005 since the tax liability on Manpower Recruitment or Supply Agency Services came into effect only from that date.

(ii) To reconsider the appellant's submissions in respect of the services provided outside India and accord benefit under the provisions of Export of Service Rules as admissible;

(iii) To reconsider their claim that they have provided services to SEZ and extend benefit under Notification No.4/2004-ST as admissible.

(iv) The final tax liability shall be recalculated in the de novo proceeding by the adjudicating authority as directed at Sl.No.(i) to (iii) above and after extending cum-tax-benefit in such recalculation.

Appeal is partly allowed on above terms.

(dictated and pronounced in court)

(Madhu Mohan Damodhar) **Member (Technical)**	**(Sulekha Beevi C.S)** **Member (Judicial)**

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