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

Appeal No.ST/247/2010

[Arising out of Order-in-Original No.2/2010 – S.Tax/Ch.IV dt. 26.04.2010 passed by the Commissioner of Central Excise, Chennai-IV]

Future Focus Infotech Pvt. Ltd. Appellant

Versus

Commissioner of Central Excise (ST),
Chennai-IV 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 : 27.02.2018

FINAL ORDER No. 41108 / 2018

Per Bench

M/s.Future Focus Infotech Pvt. Ltd. (appellant herein) entered into agreements 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 sent 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, IBM, Cap Gemini etc. based on bipartite agreements entered into from time to time, for provision of software services at the client's premises. Department took the view that appellants are only supplying man power to TCS in Special Economic Zones and other similar organizations as per the requirements and that the appellants are not engaged in development of any software on their own but are only providing employees to TCS and other organizations. Department issued various show cause notices proposing that activities of the appellants are liable to be classified under "Man Power Supply or Recruitment Agency w.e.f. 16.6.2005 and also proposing demand of service tax liability under that category along with interest and for imposition of penalties. The details of said show cause notices are tabulated below :-

S.No.	SCN No.	Period	O-I-O (Impugned order)	ST Amount	Penalties
1.	250/2008 dt. 26.09.2008	October 2007 to March 2008	2/2010 dt. 26.04.2010	83,38,465	Rs.200 per day / 2% pm (Sec.76)
2.	233/2009 dt. 14.05.2009	April 2008 to September 2008		52,05,985	Rs.200 per day / 2% pm (Sec.76)
3.	211/2009 dt. 22.04.2009	April 2007 to March 2008		10,52,160	Rs.200 per day / 2% pm (Sec.76) Rs.10,52,160 (Sec.78)

These show cause notices culminated in Order No.2/2010 dt. 26.04.2010 (impugned order) where the adjudicating authority has confirmed the activities of the appellant under "Man Power Supply or Recruitment Agency Service" and rejected the claim for exemption under Notification No.4/2004-ST for services rendered to units in Special Economic Zones and for want of proper documentary evidence and also confirmed the demands of service tax with interest as proposed in the notices and also imposed penalties under Section 76 & 78 of the Finance Act, 1994. Hence this appeal.

2. On 27.02.2018 when the matter came up for hearing, Ld. Advocate Shri G. Natarajan fairly points out that in their own case for a previous period, CESTAT Chennai in a decision reported in 2010 (18) STR 308 (Tri.-Chennai), had held that the activities of the

appellant would fall within the scope of "Man Power Supply or Recruitment Agency Service".

3. However, Ld.Advocate further contends as under :

i. The earlier decision in respect of *Future Focus Infotech India (P) Ltd.* was passed by the Tribunal vide Final Order Nos.246-247/2010 dt. 03.03.2010. However on the very same date, vide Final order No.259/2010 dt. 03.03.2010 in the case of *Cognizant Tech.Solutions (I) Pvt. Ltd.* on similar facts, the Tribunal had held that the nature of services provided by the appellant therein were in the nature of Information Technology (IT) services. Ld. Advocate submits that in view of the contrasting views taken by the Tribunal, the decision in the *Cognizant* case may be applied in their own appeal or alternatively, the issue per se may be referred to a Larger Bench.

ii) Ld. Advocate took us to the agreements with Tata Consultancy Services to highlight that appellant had only offered services of selected employees for work on development, implementation and maintenance of specific projects to be identified and allocated by TCS. He also draws attention to certificate dt. 12.03.2010 issued by TCS wherein it has been clarified that TCS are interested in obtaining software services from the appellant and not in obtaining man power simplicitor.

iii) Ld. Advocate also took us to the Software Support Agreement between the appellant and Infosys Technologies Ltd. in page 252 of the appeal book, to emphasize that they were responsible only for application and programme maintenance etc. for Infosys. The appellant had provided same services to various SEZ units of TCS also and claimed exemption as per Notification No.4/2004-ST. They had submitted all these details of services provided to SEZ units to the Commissioner. Ld. Advocate points out that as per Sections 26 & 51 of the SEZ Act, 2005 and Rule 10 of the SEZ Rules, 2006, the SEZ unit is entitled to procure services without payment of service tax and provisions of SEZ Act shall have overriding effect over the provisions of any other law. However, Commissioner has not accepted their submission only on the ground that they have not provided any invoices raised for providing services to SEZ units and also that certificates in some cases issued by Development Commissioner have not been produced.

iv) Demand on TDS component for post-16.05.2008 is not sustainable as the said services have been provided only to SEZ units.

v) The demand from April 2007 to September 2007 is hit by limitation as the issue has been seized by the department in previous notices. The internal audit party did not raise any objection on non-payment of service tax on TDS component.

4. On the other hand, Ld. A.R Shri K.P.Muralidharan supports the impugned order. He submits that the Adjudicating Commissioner has analyzed various contracts entered into by the appellant and has clearly found that the activities carried on by them are only in the nature of man power supply services. Ld. A.R also submits that the very same dispute had been addressed by the CESTAT, which has resulted in an earlier order in their own case in *Future Focus Infotech (I) Pvt. Ltd.* Vs CST - 2010 (18) STR 308 (Tri.-Chennai), where the issue has been decided against the very same appellant.

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

6.1 We first take up the arguments of the Ld. Advocate in respect of the decisions of this Tribunal in the appellant's own case and that in the case of *Cognizant Tech Solutions (I) Pvt. Ltd.* (supra), where, according to the Ld. Advocate, CESTAT have arrived at contrasting decisions though similar facts were involved.

6.2 In the *Future Focus Infotech* decision, the Tribunal, after having gone into the agreements of the appellants with Infosys, TCS etc., has observed that although there are clauses in these agreements 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. The Tribunal concluded 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. The relevant portions of the said decision are reproduced are reproduced below :-

> “**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.

14. The learned special counsel for the Department has rightly pointed out a significant provision in the contracts which require the appellants to replace personnel who leave the job by suitably trained personnel as substitutes. Such provisions in the contract go to show that the number of skilled persons supplied is important from the point of view of TCS and Infosys. If the appellants were actually to deliver the software projects, TCS and Infosys would have nothing to say about how many personnel the appellants engage to complete the project or who they employ.

15. Looking at all aspects of the case and taking into account all the arguments made before us, we come to the conclusion that the appellants are only supplying skilled manpower for which they are liable to pay Service tax for supply of manpower services. We note that for similar activities of the appellants in respect of two other clients namely IBM and CAP GEMINI, the appellants have paid Service tax under the category ‘manpower supply service’ and their clients in turn took credit of such Service tax paid by the appellants.

16. In view of our finding as above, we confirm the demand of Service tax, cess and interest and imposition of penalty under Section 76 in respect of both the appeals. As regards Appeal No. S/173/2008, we are of the view that the penalty imposed under Section 76 meets the ends of justice and hence no separate penalty under Section 78 is warranted specially keeping in view the fact that penalties under Section 76 and Section 78 have been made mutually exclusive by amendment of the law subsequently. Accordingly, we set aside the penalty imposed under Section 78.”

6.3 In the case of *Cognizant* decision (supra), we find that the facts were different. Appellants therein were required to provide Pfizer with certain biometric services in connection with Pfizer sponsored clinical studies on a project-specific basis. The appellant’s own employee would be serving as a Project Manager for that project or for the management of retained staff. The appellants therein were required to recruit and retain a definite number employees to work on such Pfizer sponsored studies. As per the Service Description in the Agreement, the staff of the appellants would provide data management and bio-statics and reporting services for Pfizer and further appellant would provide "Global Clinical Data Services" / Clinical Programming and Writing (CPW) for various protocols. Based on these parameters as found from the agreement, it is seen that appellants therein were providing functional services to Pfizer relating to data management, bio-statics and reporting through the same man power which has been recruited, retained and trained; consequently these are in the nature of IT services as the same relates to data management. The relevant portion of the Tribunal decision in *Cognizant* case is reproduced for ready reference :

> **"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."

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 ld. Advocate's contention that the Tribunal has given contrasting decisions on same sets of facts in these cases.

6.5 We further find that the facts which had been addressed by the Tribunal in the appellant's own case are very much present in the present appeal also. Ld. Advocate has been at pains to take us to various contracts / agreements with TCS, Infosys etc. to contend that they were in fact engaged in information technology activities and not in merely supplying of man power. However, a close look of the very same agreements touched upon by the ld. Advocate lead us to contrary findings. For example, in the contract with TCS dt. 13.05.1997 at page 123 of the appeal book, it has been clearly mandated that trained staff of the appellant will be "*exclusively used for TCS related work*". So also, in the Business Associate Agreement dt. 1.7.2003, between the appellant and TCS, found in page 180 of the appeal book, a reference is made to "*a pool of highly skilled and specialized Employees experienced in the development, enhancement, implementation and maintenance of software projects*". It is also indicated therein that the appellant would be deputing its employees to TCS and TCS' client locations, to work on the project with TCS project team. In the scope of the activities of the appellants in para-3 of the agreement, it is provided that appellant will offer services of its selected employees to work on the development, implementation and maintenance of specific projects to be identified and allocated by TCS and the latter's sole and absolute discretion and to carry out such functions and project related activities as may be allocated by TCS only. More crucially, in para 4.5, it is mandated that the agreement does not obligate TCS either to contract out any service to BA (appellant) or to provide any minimum level of work to BA.

6.6 Ld. Advocate has drawn our attention to a letter dt. 12.03.2010 issued by TCS to highlight that TCS are not interested in obtaining manpower simplicitor from them. However, in the very same letter, it is again reiterated that appellant will offer technical assistance to TCS through services of its selected employees to work on projects identified and allocated by TCS at its sole and absolute discretion. In para 7 (e) it is again reiterated that employees of the appellant have to carry out such functions and activities as may be allocated to them by TCS only.

6.7 Even in the Software Support Agreement between the appellant and Infosys dt.05.07.2002, found in page 252 onwards of the appeal book, it is mandated that appellants are to depute staff consultants to perform tasks/projects/assignments for Infosys. In para 7 (II) (3) (b) of the agreement, it is laid down that payment is based on the number of days of services provided by appellant and that actual rate per Person Day will be mutually decided based on the skill-set, experience etc. of the personnel provided by the appellant.

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.

6.10 However, we find merit in the contention of the appellant in respect of services provided to SEZ units. As per the overriding effect of Section 26 & 51 of the SEZ Act 2005 read with Rule 10 of SEZ Rules 2005, they would be eligible for exemption from payment of service tax and also for the exemption extended in Notification No.4/2004-ST dt.31.03.2004. The adjudicating authority has not considered this claim of the appellant on the ground that sufficient documents have not been produced by the appellants. We consider it proper to remand this issue to consider the appellant's submissions in this regard. In such de novo adjudication, the authority concerned will examine the eligibility of the claim of exemption on the basis of documents produced by the appellant. Additional documents, if required, are also permitted to be produced by the appellants during such de novo adjudication.

6.11 Show Cause Notice No.250/2008 dt. 26.9.2008 was issued for the period October 2007 to March 2008 seeking to demand of service tax on Manpower Recruitment and Supply Service activities. However, we find that almost after seven months, another SCN dt.

22.04.2009 has again been issued for more or less the same period, namely, April 2007 to March 2008, this time proposing service tax liability only in respect of TDS component which was not included in the above show cause notice. Ld. Advocate has contended that the demand raised on TDS by way of a second SCN is hit by time-bar. We find merit in this argument. Nothing could have prevented the department from including the demand on the TDS portion in the earlier SCN dt. 26.9.2009. Hence that part of the impugned order confirming the service tax demand of Rs.10,52,160/- with interest and imposition of penalties in respect of TDS portion, for the period April 2007 to March 2008, will require to be set aside, which we hereby do so.

6.12 However, with regard to penalties, we find merit in the contentions put forth by Ld. Advocate. Without doubt, the issue in dispute is with regard to classification of the activities of the appellant and therefore an interpretational issue. We are therefore of the considered opinion that all the penalties imposed are unwarranted and require to be set aside, which we hereby do.

To sum up,

(i) 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.

(ii) Demand of Rs.10,52,160/- related to demand on TDS portion for the period April 2007 to March 2008 in the SCN in respect of SCN dt. 22.4.2009 is set aside as per directions contained in para 6.11 supra.

(iii) The demand in respect of services provided to SEZ units directed to be revisited in the de novo adjudication as per the directions contained in para 6.10 supra.

(iv) The net liability as arrived at in such de novo adjudication, with interest liability thereon, will be payable by the appellant.

(iv) All penalties are set aside as per para 6.12 supra.

Appeal is disposed of accordingly.

(operative part of the order pronounced in court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S)
Member (Judicial)

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