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

S.No.	Appeal No.	Appellant	Respondent
1.	ST/244/2012	Turbo Energy Ltd.	CGST & CE Chennai Outer
2.	ST/228/2012	CGST & CE Chennai Outer	Turbo Energy Ltd.
Arising out of Order-in-Appeal No.04/2012 dt.23.01.2012 passed by the Commissioner of Central Excise & Service Tax (Appeals) Chennai			

Appearance :

Ms. Nancy, Advocate
For the Assessee

Shri A. Cletus, ADC (AR)
For the Revenue

CORAM :

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

Date of hearing / decision : 26.09.2018

FINAL ORDER No. 42478-42479 / 2018

Per Bench

The facts of the case are that M/s.Turbo Energy are engaged in manufacture of turbo chargers and parts thereof and are also registered as service tax assessee. During scrutiny of records, it appeared to the department that assessee had rendered Man Power Recruitment or Supply Agency Service (for short, MRSA) during 2005-06 and 2006-07, however had not discharged service tax liability thereon. It was noticed that assessee had deputed manpower to their clients during 2005-06 and 2006-07 and realized deputation charges from them. Department took the view that service tax is required to be paid on such activity under MRSA, hence show cause notice dt. 28.05.2010 was issued *inter* *alia,* proposing demand of Rs.20,42,314/- being service tax amount not discharged by the assessee during 2005-06 & 2006-07 with interest thereon, along with imposition of penalties under Section 76, 77 & 78 ibid. In adjudication, the original authority vide an order dt. 04.10.2010 however confirmed demand to the extent of Rs.18,23,910/- with interest thereon imposed equal penalty under Section 78 of the Finance Act and also under Section 76 & 78 ibid. In appeal, Commissioner (Appeals) vide impugned order No.04/2012 dt. 23.01.2012 accepted the submission of the assessee that except one company namely Lapross Engineering Ltd., employees were deputed among group companies, salary was paid through book adjustment, hence there was no relationship of service provider and service recipient and hence they are not liable for service tax in respect of these companies during the period of the dispute. The lower appellate authority found that there is no material evidence to prove that the asessee is an agency for supply of manpower and that there is no finding regarding the agreement between the assessee and the individual for used of the services of that individual to their clients for a consideration. For these reasons, the LAA found that the services provided to such group companies will not come under the category of MRSA services. The LAA held that though service tax is liable to be paid on the said service, the SCN is time-barred; that since accounts of assessee were subject to scrutiny on many occasions, the said demand is time-barred. Lower appellate authority however held that demand of service tax along with interest “could be settled under section 73 (3) of the Finance Act, 1994”. Both the assessee and the department are aggrieved with the above impugned order.

2. The assessee in their Appeal ST/244/2012 have submitted that the impugned order is not clear; that while the Commissioner (Appeals) has allowed the appeal as time-barred, has however directed to settle the tax under Section 73 (3) of the Act. The department has filed Appeal ST/228/2012 against setting aside part of the demand and setting aside of penalty under MRSA service by the Commissioner (Appeals).

3. Today when the matter came up for hearing, on behalf of the assessee, Ld. Advocate Ms. Nancy made oral and written submissions which can be summarized as under :

i) They have deputed the employees to their sister concern or units and collected deputation charges from the latter. Therefore, the services rendered by them do not fall under the category of Man Power Recruitment Agency and Supply service.

ii) The assessee places reliance on the case of Commissioner of Service Tax Vs. Arvind Mills Ltd., reported in 2014 (35) S.T.R. 496 (Guj.), wherein it was held that deputation of employees to their group company will not come within the definition of Man Power Recruitment Agency and Supply Service.

iii) The monetary limit for filing of appeal by the department is Rs.20 Lakhs. In the present case, the demand of service tax Rs.18,23,910/-, which is less than the above amount, hence department may be dismissed under litigation policy.

4. On the other hand, Ld. A.R Shri A. Cletus with regard to assessee's appeal submits that there is nothing wrong in the ruling of the Commissioner (Appeals) advising the assessee to pay up the amount under Section 73 (3) of the Act. With regard to department appeal, he reiterates the grounds of appeal.

5. Heard both sides and have gone through facts.

6.1 The scope of service tax liability in respect of the activity of staff to subsidiary / group companies is no longer *res integra*. The Hon'ble High Court in the case of *CST Vs Arvind Mills Ltd*. - 2014 (350) STR 496 (Guj.), has held that subsidiary companies cannot be said to be client of holding company and the deputation of employees was only for and in the interest of the company; there is no relation of agency and client. The relevant portion of the said judgment is reproduced as under :

> **"5.** It is true that in the present form, the definition of Manpower Supply Recruitment Agency is wide and would cover within its sweep range of activities provided therein. However, in the present case, such definition would not cover the activity of the respondent as rightly held by the Tribunal. To recall, the respondent in order to reduce his cost of manufacturing, deputed some of its staff to its subsidiaries or group companies for stipulated work or limited period. All throughout the control and supervision remained with the respondent. As pointed out by the respondent, company is not in the business of providing recruitment or supply of manpower. Actual cost incurred by the company in terms of salary, remuneration and perquisites is only reimbursed by the group companies. There is no element of profit or finance benefit. The subsidiary companies cannot be said to be their clients. Deputation of the employees was only for and in the interest of the company. There was no relation of agency and client. It was pointed out that the employee deputed did not exclusively work under the direction of supervision or control of subsidiary company. All throughout he would be under the continuous control and direction of the company.
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> **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."

6.2 Respectfully following the ratio already laid down, we hold that in respect of employees deputed by the assessee to their group companies we do not find any infirmity in the decision of the Commissioner (Appeals) setting aside the demand in respect of employees deputed by the assessee to the group companies.

6.3 In the event, no merit is found in respect of the grievance of the Department regarding setting aside by LAA of the demand under MRSA in respect of services provided by assessee to group companies. In any case, the disputed amount that was before the LAA is only to the tune of Rs.18,23,910/- and hence department's appeal against such order will not be in keeping with the litigation policy vide Board's instruction being F.No.390/Misc./1116/2017-JC dt. 11-07-2018. which prescribes monetary limit of Rs.20 lakhs for filing of appeal before this forum. For all these reasons, the Appeal ST/228/2012, filed by the department is dismissed.

6.4 Coming to the assessee appeal ST/244/2012, Commissioner (Appeals) has held that service tax is liable to be paid in respect of employees deputed to Lapross Engineering Ltd., however, he has set aside the demand on time-bar. We find it intriguing that having taken the decision to set aside the demand in respect of Lapross Engineering on time-bar, nonetheless, the lower appellate authority has opined that payment of service tax with interest could be settled under Section 73 (3) of the Act. In our opinion, the option to pay up the service tax under Section 73 (3) of the Finance Act, 1994 is made only at the initial stage when the escaped liability is brought to the notice of the assessee by the department or by the assessee on their own accord. In such a situation, once the assessee pays up the tax liability with interest thereon, no further SCN is required to be issued. However, in the present case, a SCN has very much been issued and the adjudication thereof has culminated in confirmation of the demand. At such a later stage, if the LAA finds that demand is time-barred, he should only set aside the demand on that ground but cannot advise assessee concerned to discharge the disputed amount through Section 73 (3) ibid. While are not able to find any fault with the finding of Commissioner (Appeals) that the said demand is time-barred as the assessee had been audited on more than one occasion earlier, we set aside that portion of the order which opines that the disputed demand could be settled under Section 73 (3) ibid. So ordered. Impugned order to this extent is set aside and assessee's appeal ST/244/2012 is allowed with consequential benefits, if any, as per law.

7. To sum up —

Assessee appeal ST/244/2012 is allowed

Department appeal ST/228/2012 is dismissed.

(operative part of the order pronounced in court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi, C.S)
Member (Judicial)

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