IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
[COURT III : Division Bench B1]

Application No.: ST/Misc[CT]/41115/2017
Appeal No.: ST/00353/2011

[Arising out of Order-in-Original No. 14/2011-S.Tax/Ch. IV dated 21.03.2011 passed by the Commissioner of Central Excise, Chennai-IV Commissionerate]

M/s. Coromandel Infotech India Ltd., **: Appellant**
New No. 2, Old No. 4, Mount Towers,
Mount Poonamallee Road, Manapakkam,
Nandambakkam Post, Chennai – 600 089

Versus

The Commissioner of G.S.T. & Central Excise, **: Respondent**
Chennai South Commissionerate
(Formerly : 'The Commissioner of Central Excise, Chennai-IV Commissionerate')

Appearance:-
Shri. M. N. Bharathi, Advocate
Shri. S. Muthu Venkataraman, Advocate
for the Appellant

Shri. A. Cletus, ADC (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: 20.11.2018
Date of Pronouncement: 04.01.2019

Final Order No. 40013 / 2019

Per Bench :

The facts of the case are that the appellants were providing various services including Manpower Recruitment or Supply Agency Services.

2.1 Pursuant to audit by the Department, it emerged that the appellants, in certain cases, did not charge service tax on apparent supply of Manpower to their clients which are IT companies like M/s. Infosys for development of software project. The Department took the view that for the services provided by the appellant by deputing personnel to M/s. Infosys and other client locations to work on client project, the Manpower deputed worked under the overall supervision of their clients; that the deputed Manpower also performed such other functions as may be called upon to do from time to time; that for rendering these services, appellants are paid a professional/service fee by M/s. Infosys/other clients as agreed upon in terms of the agreement. The Department also took the view that in such cases, the appellants are not engaged in development of any software on their own but are only providing Manpower which is utilized by the software companies for development, implementation and maintenance of software projects.

2.2 It also appeared from audit that appellants had availed CENVAT Credit of service tax paid on services like Staff Insurance, Travels and Catering Services towards payment of service tax on output service; that however, the above said services were not used for providing output services and are not eligible input services.

2.3 Accordingly, a Show Cause Notice dated 05.06.2009 was issued to the appellants *inter alia* proposing demand of service tax liability of Rs. 95,68,100/- towards Manpower Supply Service and Rs. 2,01,732/- towards the alleged ineligible input services with interest thereon and also imposition of penalties under various provisions of law. In adjudication, the Commissioner vide impugned Order dated 21.03.2011 confirmed the demands with interest as proposed in the Show Cause Notice and also imposed equal penalties under Section 78 of the Finance Act, 1994. Hence, this appeal.

3. When the matter came up for hearing, Ld. Counsel Shri. M.N. Bharathi and Shri. S. Muthu Venkataraman appearing for the appellant made oral and written submissions, which can be broadly summarized as under :

(i) They adverted to the Show Cause Notice as well as the Stay Order passed in the above appeal to argue that appellants have not been provided with the split-up details of the demand raised in the Show Cause Notice;

(ii) The income of the appellant comes from various streams such as sale of software directly to end clients, export of services to overseas clients and other professional services. However, the demand has been raised without specifying as to what activities from these income streams are taxable. After receipt of the Show Cause Notice, the appellants in spite of their best efforts could not find out as to which transaction with which clients are liable to service tax from these various streams of income;

(iii) It is submitted that service tax is not payable on export sales or software development. Further, the liability of service tax, if any, has to be studied invoice-wise or client-wise by examining the nature of service, contract, invoice, etc. Hence, the demand of service tax by a sweeping finding that the appellants have realized the entire revenue by deputing their staff to clients like M/s. Infosys is not sustainable in law and the demand is liable to be set aside. They also filed sequence of events from the SCN stage till the adjudication order to substantiate the contention that the impugned Order was passed without affording the appellant details of the demand raised and opportunity to present their case;

(iv) It is submitted that the SCN is vague and workings are not clear and even at this stage of appeal, the Revenue is unable to substantiate the quantification of demand. The SCN is the foundation of a demand and the charges in the SCN should be specific and not vague so as to enable the assessee to defend the same effectively. Any vague and general notice is not sustainable in law. They relied on the following decisions :

- *Delta International Ltd. Vs. C.C. – 2012 (281) E.L.T. 400 (Cal.)*
- *Rajmal Lakhichand Vs. C.C. – 2010 (255) E.L.T. 357 (Bom.)*

(v) The lower authority has without application of mind merely confirmed the demand proposed in the SCN without going into the workings, taxable value, client-wise details, nature of service rendered, etc. The lower authority has ignored the export of service, software development by appellant at their premises, projects undertaken by appellant for M/s. Yahoo, M/s. HP based on specific orders which is duly reflected in the purchase order.

(vi) In terms of the decision of this Tribunal in ***M/s. Cognizant Tech Solutions Vs. C.S.T. – 2010 (18) S.T.R. 326 (Tri. – Chennai)*** if the projects are identifiable and if there is evidence of the appellant/assessee developing software/IT services, the same is not taxable under manpower supply.

(vii) It is settled law that demand of tax made on the basis of ledger accounts/balance sheet is not sustainable and the demand is liable to be set aside. They relied on the following decisions :

- *Tempest Advertising Vs. C.C.E. – 2007 (5) S.T.R. 312 (Tri. – Bang.);*
- *Alpha Management Consultant Vs. C.S.T. – 2007 (6) S.T.R. 181 (Tri. – Bang.);*
- *Steel Cast Vs. C.C.E. – 2009 (14) S.T.R. 129 (Tri. – Ahmd.);*
- *CST, Ahmedabad Vs. Azur Cyber P Ltd. – 2008 (12) S.T.R. 575 (Tri. – Ahmd.);*
- *Rama Paper Mills Vs. C.C.E., Meerut – 2011 (22) S.T.R. 19 (Tri. – Del.);*

(viii) The appellants have declared the entire transactions with all their clients in their ledgers, books of accounts, bank records, etc. In other words, the entire income received from the clients is shown as business income in the company accounts. There is no allegation to the effect that the appellant has suppressed the transactions in question nor concealed the same with an intention to evade service tax. It is a fact that during the course of enquiry and verification, on being directed the appellant provided the ledger extracts and the notice was issued based on the above, without even providing work sheet for the taxable value on which tax is to be paid.

Reliance is placed on the following decisions to submit that extended period of limitation cannot be invoked :

- *Commissioner of C.Ex., Cus. & S.Tax Vs. Suvidha Engineers India Ltd. – 2017 (50) S.T.R. 268 (Allhd.) upheld by the Hon'ble Supreme Court in Commissioner Vs. Suvidha Engineers India Ltd. – 2018 (11) G.S.T.L. J83 (S.C.);*
- *Commissioner of C.Ex., Noida Vs. Accurate Chemical Industries – 2014 (310) E.L.T. 441 (Allhd.);*

(ix) It is further submitted that the underlying issue herein relates to classification of services and thereby involves interpretation of law and thus extended period of limitation cannot be invoked.

- *Singh Transporters Vs. Commissioner of Central Excise, Raipur – 2012 (27) S.T.R. 488 (Tri. – Del.) upheld in Commissioner Vs. Singh Transporters – 2018 (13) G.S.T.L. J40 (S.C.);*
- *Sundaram Finance Ltd. Vs. Commissioner of C.Ex., S.T., LTU, Chennai – 2018 (11) G.S.T.L. 305 (Tri. – Chennai);*

4. On the other hand, Ld. AR Shri. A. Cletus appearing for the Revenue supported the findings in the impugned Order. He submitted that the appellant has provided 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. He 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 to argue 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.

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

6. 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.

7.1 The identical issue was addressed by this 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 ld. Advocate's contention that the Tribunal has given contrasting decisions on same sets of facts in these cases.*
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> *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.*
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> *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. "*

7.2 We find that the facts of this appeal are *pari materia* with that of *M/s. Future Focus Infotech India Pvt. Ltd. Appeal No. ST/247/2010* wherein *Final Order No. 41108/2018 dated 27.02.2018* had been passed by us. Hence, on merits, we do not find any case for the appellants, with regard to demand under the category of Manpower Supply Services.

8. The Ld. Counsel for appellant has argued on the ground of limitation also. It is pointed out by him that in *M/s. Cognizant Tech Solutions - 2010 (18) S.T.R. 326 (Tri. – Chennai)* the Tribunal had held that such activities of supply of qualified personnel would not amount to Manpower Recruitment and Supply Services. The appellants were under the *bona fide* belief that the activity did not fall under this category and were not collecting service tax. Later in the case of *M/s. Future Focus Infotech Pvt. Ltd. (supra)* decided on 27.02.2018, the Tribunal distinguished the decision laid in *M/s. Cognizant Tech Solutions (supra)* to hold that when the supervision and control of the work executed by such deputed persons is with the clients, the activity would fall under Manpower Supply Services. Indeed the issue is an interpretational one. For these reasons, we find that the invocation of extended period is unsustainable. We hold that the demand raised invoking the extended period requires to be set aside which we hereby do.

9. Further, we do find merit in some of the other contentions put forth by the Ld. Counsel, in particular, the argument that there is no clarity or breakup in respect of the quantification of the tax demand.

We note that this matter had vexed the Bench even at the stage of hearing of the Stay Petition. This is evidenced by the Stay Order dated 05.02.2014, wherein the Bench recorded as under :

> *" It is seen from the impugned order that service tax was demanded on the total taxable value of Rs. 8,08,32,487/- for the period 2005-06 to 2008-09 as tabulated under the following table :-*

Value related to supply of manpower

Year	***Taxable Value***	***Service Tax***
2005-06	*1,86,39,674*	*19,01,247*
2006-07	*1,68,14,628*	*20,58,110*
2007-08	*3,94,29,307*	*48,73,462*
2008-09	*59,48,878*	*7,35,281*
Total	***8,08,32,487***	***95,68,100***

> *2. The applicant has been submitting from the stage of adjudication that they have not understood what is the split up of the individual figures which are adding up to the figures for each year as stated in the above table. Last time, when this matter came up for hearing on 09.01.2014, the Revenue was orally instructed to furnish the break up. The Ld. AR for Revenue sought time to place the work-sheet at the time of next hearing. Today, the Ld. AR has submitted a letter C. No. IV/03/197/2011-R&T dt. 5.2.2014 enclosing the calculation based on the ledger accounts of the assessee. We find that even now it is not clear what are the individual amounts which are adding up to the following figures namely :-*
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> *1) Rs. 1,86,39,674/-*
> *2) Rs. 1,68,14,628/-*
> *3) Rs. 3,94,29,307/-*
> *4) Rs. 59,48,878/-*
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> *3. There are two sheets which are enclosed with the calculations but we are not able to easily correlate the figures which are adding up to each of the four figures mentioned above. Therefore, it appears that the assessee might have also faced this problem at the time of furnishing reply to SCN and they might have been handicapped in making proper submission…"*

10. It is not disputed that the income of the appellant comes from various streams such as sale of software directly to end clients, export of services to overseas clients and other professional services. It has not been clarified in the Show Cause Notice or even at the

stage of the stay petition before this Tribunal as to whether the value taken for working out the tax liability includes all these streams of income. It is also not clear as to whether any tax exempt streams of income, for example, say, in relation to export of services, have also been included in the said valuation or not. We find that at the stage of issue of the Show Cause Notice itself, the appellants had flagged their inability to find out as to which transactions with clients are liable to service tax from the various streams of income reflected in the books of accounts *vis-à-vis* the value adopted in the Show Cause Notice.

11. We therefore find merit in the contention of the appellants that the adjudicating authority has confirmed the demand on the value of Rs. 8,08,32,487/- with a cursory examination of contracts for a value of Rs. 2,74,05,187/- only mechanically, without examining the factual position and without appreciating the argument conveyed by the appellants about the lack of clarity in working out the tax liability. Though the Revenue was given enough opportunity to ascertain the basis on which the taxable turnover was quantified for determination of service tax, till now they have not been able to put forth any details.

12. We are then of the considered opinion that the Show Cause Notice itself suffers from an incurable deficiency with respect to the calculation of tax liability proposed therein. We have also noted that the Revenue, even at the Tribunal stage, has not been able to throw any further light in the matter. This being so, we find that not only the proceedings are vitiated by the said defect, but also we do not foresee any useful purpose for remanding the matter for re-consideration *de novo* by the adjudicating authority.

13. In arriving at this conclusion, we find resonance in the ratio taken by the Hon'ble High Court of Calcutta in *Delta International Ltd. (supra)* relied on by the Ld. Counsel. The Hon'ble High Court in that judgement has held that in respect of the Show Cause Notice which indicated the amount of customs duty but reasons in support thereof were found to be ambiguous, the Notice itself was held as devoid of grounds, reasons or particulars in support of its claim against the rules of natural justice and hence, not sustainable. The relevant portions of the judgement are as under :

> *" **16.** In our opinion, whether they have the power to do so or not is very secondary. No case has prima facie been made out against the appellant/writ petitioner which he can be required to answer. Under well settled principles if a show cause notice does not disclose any contravention or infraction of any provision of law the person or such show cause notice is a nullity. But, here, it is not such a case. The grounds made in the show cause notice allege that customs duty of Rs. 7,08,98,160/- is due but the reasons in support of such claim in the show cause notice are very ambiguous so much so it is impossible to understand*

anything else by reasonably any prudent person. Therefore, the appellant/writ petitioner, in our opinion, is not in a position to answer such show cause notice, which is against the rules of natural justice.

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20. *The learned judge of the court below seems to have dismissed the writ application only on the ground that in his opinion, the writ petitioner had not come to court with clean hands. Apart from that we do not find any other cogent reason in the judgment and order for dismissal of the writ application."*

14. In the circumstances, we conclude that the demand of Rs. 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 Rs. 95,68,100/- under Section 78 ibid will also get extinguished.

15. Coming to the second demand of Rs. 2,01,732/- we find that this relates to the proposition that the appellants have availed Credit of ineligible input services relating to Staff Insurance, Travels and Catering Services. We note that the period involved is from June 2005 to May 2008 when the definition of input services had a wide ambit as it included the words 'activities relating to business'. This being so, denial of these input Credits on the ground that they have no nexus in providing output services cannot sustain and will require to be set aside on merits, which we hereby do. The case laws

relied upon by the Ld. Counsel support their case. In the event, the demand of Rs. 2,01,732/- with interest along with accompanying equal penalty under Section 78 ibid will also not survive and is set aside.

16. The appeal is then allowed on above terms.

17. The Miscellaneous Application filed by the Department for change in cause title is allowed.

(Pronounced in open court on ***04.01.2019****)*

(Madhu Mohan Damodhar)
Member (Technical)

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

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