

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, CHENNAI**

Service Tax Appeal No.178 of 2012

(Arising out of Order-in-Original No. 124/2011 dated 19.12.2011 passed by the Commissioner of Central Excise, Chennai – III, Chennai)

M/s. Sak Soft Limited

No. 40, SP Info City, Dr. M.G.R. Salai
Kandanchavadi, Perungudi
Chennai – 600 096.

Appellant

Vs.

Commissioner of GST & Central Excise

Chennai South Commissionerate
MHU Complex, No. 692, Anna Salai
Nandanam, Chennai – 600 035.

Respondent

APPEARANCE:

Shri Raghavan Ramabhadran, Advocate for the Appellant
Ms. T. Usha Devi, JC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri P. Anjani Kumar, Member (Technical)

Final Order No. **40735 / 2021**

Date of Hearing : 13.01.2021
Date of Pronouncement: 24.02.2021

Per Ms. Sulekha Beevi C.S.

The above matter has come up for hearing as per the remand order of the Hon'ble High Court in CMA No. 655/2020 dated 4.8.2020. This Tribunal had disposed the appeal vide Final Order No. 40401/2019 dated 27.2.2019. The Revenue filed an appeal against such order before the Hon'ble High Court and as per the judgment in the abovementioned CMA, the Hon'ble High Court has remanded the matter to rehear issue No. 4 on merits as well as on the ground of

limitation. The relevant portion of the judgment of the Hon'ble High Court is noticed as under:-

“7. Mere reference of the citations in the order and then holding that the extended limitation could not be invoked to the Revenue is a serious prejudice caused to the interest of the Revenue, in the absence of discussing the Order dt.04.08.2020 in C.M.A.No.655 of 2020 relevant facts, and giving reasons, for arriving at a particular conclusion. We are restraining ourselves from expressing anything further on the tenor of the order passed by the learned Members of the Tribunal in the present case.

8. We hope and expect that the learned Members, and even other Members, who deal with the appeals from now onwards, in such Revenue matters, should understand the letter and spirit of these observations of the High Court.

9. We accordingly set aside the said order of the learned Tribunal on the said issue no.4, regarding taxability of manpower services and application of extended limitation in the present case and restore the appeal back to the learned Tribunal, with a request to hear the appeal de novo on the said issue and decide the same as expeditiously as possible. We are not in a position to answer the questions raised by the Revenue in the present appeal at this stage, for the aforesaid reasons.

10. The appeal is accordingly disposed of, without any order as to costs.”

2. Issue No. 4 is in regard to the demand of service tax on Manpower Recruitment or Supply Agency Service (hereinafter referred to as MRSA services) for the period 16.6.2005 to 2007 – 08.

3. The appellant is engaged in providing information technology related solutions including maintenance of software etc. They are paying service tax under Information Technology Software Services after such services have become taxable in 2008. The department was of the view that for the period prior to 2008, as per the agreements entered by the appellant with various clients, the appellants have rendered MRSA services to these clients. This allegation has been defended by the appellant stating that the services are nothing but Information Technology Software Services for which they have been

paying service tax after 2008 and that these activities will not fall under the definition of MRSA.

4. On behalf of the appellant, Id. Counsel Shri Raghavan Ramabhadran appeared and argued the matter. He submitted that the appellant is a global IT services and consultancy company providing IT solutions for business in Banking, Financial and Insurance Sectors. The appellant offers IT solutions by way of application development and maintenance, business intelligence and data warehousing, application integration, testing, conversion / migration / reengineering etc. The Hon'ble High Court has remanded the matter to reconsider Issue No. 4 where the demand raised under manpower recruitment and supply agency service for the period 16.6.2005 to 2007 – 08. It is submitted by him that the appellant has paid service tax for these services under Information Technology Software Services from the period 16.5.2008. This has been accepted by the department. He referred to para 9.7 of the reply to show cause notice to substantiate this argument. The department is now trying to bring the very same services under MRSA for the period prior to 16.5.2008. The department has not objected to the classification of the services under Information Technology Software Services for the period commencing from 16.5.2008. Therefore, no tax liability can be imposed under a different category for the activities in the very same nature for the period prior to the introduction of levy of service tax on Information Technology Software Services. He relied upon the decision of the Hon'ble Supreme Court in the case of Indian National Shipowners Association – 2011 (21) STR 3 (SC) and argued that when a specific new service is introduced without carving out any scope from the existing service category, such services

can be liable to service tax only from the date of introduction of such new service. Similar view was taken in the case of Commissioner of Vs. IBM India Pvt. Ltd. – 2010 (18) STR J137 (SC). In this case, the Apex Court upheld the Tribunal's finding that ERP management services were classifiable under Information Technology Software Services with effect from 16.5.2008 and therefore could not be taxed under Management Consultancy Services for the period prior to 16.5.2008. The case of the department that service tax is liable on the same activity under MRSA prior to 16.5.2008 will not survive because the same transaction is accepted by the department to be Information Technology Software Services for the period after 16.5.2008.

5. Moreover, the services are predominantly provided by the appellant to companies who are not in the field of IT or software development. This will go to show that the appellant was providing Information Technology Software Services to these clients and not MRSA service. The facts are similar to the facts in the case of Cognizant Tech Solutions decided by the Tribunal as reported in 2010 (18) STR 326 (Tri. Chennai). In Cognizant Tech Solutions, the Tribunal observed that though personnel had been recruited specifically to fit the standards specified by Pfizer, the responsibility of the assessee therein did not end with supplying the personnel, the assessee was responsible for the entire project and retained control over the deployed personnel. The Tribunal held that the transaction was classifiable under Information Technology Software Services by noting that the transaction was for providing data management services even though the budget was prepared 'per seat cost'.

6. The Tribunal in the case of M/s. Future Focus Infotech Pvt. Ltd. Vide decision dated 3.3.2010, had confirmed the demand of service tax on the assessee therein on a factual finding that the contracts were for supply of skilled personnel to IT companies to work on software projects and the contracts did not evidence provision of ITSS by the assessee. Later, in M/s. Future Focus Infotech Pvt. Ltd. – 2018 (18) GSTL 441 (Tri. Chennai), the Tribunal had occasion to consider the subsequent periodical demand imposed. The two views expressed in Cognizant Tech Solutions (2010) and M/s. Future Focus Infotech Pvt. Ltd. (2010) was analyzed by the Tribunal in the said decision. It was held that each decision is still good law and would operate against different factual aspects involved in each transaction.

7. From para 6.4 of M/s. Future Focus Infotech Pvt. Ltd. (supra 2018), the following position of law emerges as a guiding light to decide which of the two views would be applicable.

(a) If the responsibility of the development, maintenance of ITSS lie with the assessee, they were rendering IT service

(b) In contract, if the IT work is done by the assessee's client with the help of manpower skill in IT work, then the transaction was one of manpower supply.

8. The Id. Counsel stressed that the appellant's core competence is of IT services, software consultancy. The tone and tenor of all the agreements executed by the appellant with its client is focused on providing specialized software services. In fact, the transactions under dispute clearly stipulate that the agreement with the appellant was for IT related services only. It is admitted that the appellant has deputed its employees to client locations for carrying out specific task as

required by the client. However, the appellant retains direct control over its employees who work on specific client projects at the client locations. From a fair perusal of the contract, it is beyond doubt that the characteristics of the transaction are software services and the personnel are only resources deputed for providing the said software services.

9. He pointed out that in the Show Cause Notice as well as Order in Original, the department has recorded the transactions under dispute as being various IT related services only. In the Order in Original, the adjudicating authority has discussed only three contracts before misconstruing the obligations emanating out of these contracts. The adjudicating authority has wrongly relied upon the decision of the Tribunal in M/s. Future Focus Infotech Pvt. Ltd. The decision in M/s. Future Focus Infotech Pvt. Ltd. and the entire line of decisions following M/s. Future Focus Infotech Pvt. Ltd. are distinguishable on facts from the appellant's contracts. The workforce allocated to the customers' premises by the appellant is only a means of rendering said software services. Therefore, the decision in Cognizant Tech Solutions (*supra*) would be wholly applicable with the instant case and the demand cannot sustain.

10. It is also argued by the Id. Counsel that the appellant is not a manpower supply agency. They are not engaged in supply of manpower in any manner. The objects of Memorandum of Association of the appellant would bring out that they are not engaged in manpower supply agency. He relied upon the decision in the case of Commissioner of Service Tax Vs. Arvind Mills – 2014 (35) STR 496 (Guj.) to argue that the Hon'ble High Court of Gujarat in the said case

held that fundamentally tax liability under MRSA would be attracted only when the provider was generally engaged in providing such service. It is further argued by him that the essence or substance in the contract is material for determination of the nature of the transaction. He relied upon the decision in the case of Super Poly Fabriks Ltd. Vs. CCE, Punjab – 2008 (10) STR 454 (SC).

11. The Id. Counsel also argued on the ground of limitation. The demand of service tax on software services rendered by the appellant is alleged by the department to be taxable under MRSA for the period from 16.6.2005 to 31.3.2008. There is no factual finding of suppression or mal-intent on the part of the appellant by the department. Though in the Show Cause Notice at para 6 it is alleged that appellant suppressed material facts with intent to evade payment of service tax, there is no evidence put forward in this regard to show that the appellant has deliberately avoided paying service tax on MRSA. In fact, classification of services is an issue involving interpretation of law. The appellant has paid service tax under Information Technology Software Services after 16.5.2008 when Information Technology Software Services was introduced. This being the admitted fact, the department cannot demand service tax on the transactions of very same nature prior to 16.5.2008. Further, the appellant had provided all documents and periodical accounting records as and when called for by the department. He relied upon the case in Continental Foundations Jt. Venture Vs. Commissioner – 2007 (216) ELT 177 (SC) to argue that there must be positive act on the part of the assessee to justify invocation of extended period. The department having failed to

establish such act of suppression with intent to evade payment of service tax, the extended period is not invocable in the present case.

12. This very same issue of MRSA came to be considered by the Tribunal on 3.3.2010 in two different matters in Future Focus Infotech and Cognizant Tech Solutions. After considering the factual matrices in each appeal and the applicable provisions, the Tribunal upheld the demand in Future Focus Infotech India Pvt. Ltd. (supra 2010) while the Tribunal set aside the demand in Cognizant Tech Solutions (supra 2010). Since there was a very narrow distinction between the facts in these cases, the same was discussed by the Tribunal in Coromandel Infotech India Ltd. Vs. Commissioner – 2019 (1) TMI 323 – CESTAT Chennai. The Tribunal set aside the demand in Coromandel Infotech for the extended period of limitation on a finding that the issue was interpretational. In various cases, it has been held that when the issue involves interpretation of application of legal provisions and applicability of facts, the invocation of extended period cannot sustain. He further stated that the decision in Cognizant Tech Solutions (supra) has attained finality as the department has accepted the ratio therein. Once the dispute has been accepted by the Revenue, they are not permitted to agitate the same issue in another assessee's case. To support this argument, he relied upon the decision of the Hon'ble Supreme Court in the case of Boving Fouress Ltd. Vs. CCE – 2006 (202) ELT 389 (SC). In the case of Calcutta Industrial Supply Corporation Vs. Commissioner – 2019 (31) GSTL 487 (Tri.) it was held that extended period of limitation is not invocable in the disputes involving classification of service. The Id. Counsel pleaded that the demand under MRSA may be set aside.

13. The Id. AR Ms. T. Usha Devi appeared for the department. She supported the findings in the impugned order. She relied upon the decision in Future Focus Infotech India Pvt. Ltd. (supra 2018) to argue that the agreements entered by the appellant would make the transaction as supply of manpower and therefore the demand under MRSA is legal and proper. After the matter was reserved for orders on 15.1.2021, the Id. AR furnished additional written submissions. In the said submission, it is noted that as per para 6.10 of the Show Cause Notice, various clients fall under manpower supply service. Out of the above clients, the agreement pertaining to ABN AMRO Bank, Citigroup Information Technology Operations and Solutions (CITOS), Punjab National Bank, Sak Consumer Retail Services Ltd. Bajaj Allianz, ING Vysya Bank Ltd. are not available. Therefore, conclusion cannot be arrived. However, in the case of Barclays Bank, Acsys Software India Pvt. Ltd. and Societe General Global Solution Centre Pvt. Ltd. the transactions perfectly fit into manpower supply. She has also referred to pages with regard to the appeal paper book regarding these clients. It is further stated by her in the cases of HDFC Bank, Scope International intellectual property rest with the receiver, location also at customer's place, finite men are supplied, however, fee is charged as per annum basis, so without proper split up, conclusion cannot be arrived. On the whole, without all the agreements, conclusion cannot be arrived as to whether it is manpower supply or information technology service and also ingredients of suppression cannot be arrived. It is also requested by her that the appellant may be given sufficient time to submit the rest of documents and issue may be reheard again.

14. Heard both sides and perused records carefully.
15. Before we proceed, it would be helpful to notice the definition of Manpower Recruitment Supply Agency (MRSA) and services as it stood during the relevant period:

Section 65(68) of Finance Act, 1994

“Manpower recruitment or supply agency” means any [person] engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, [to any other person]”

Section 65(105)(k) of Finance Act, 1994

“To any person, by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or otherwise, in any manner

Explanation – for the removal of doubts, it is hereby declared that for the purposes of this sub-clause, recruitment or supply of manpower includes services in relation to pre-recruitment screening, verification of the credentials and antecedents of the candidate and authenticity of documents submitted by the candidate”

16. Further, Information Technology Software Services which was inserted by Finance Act, 2008 with effect from 16.5.2008 is defined under section 65(53a) as under:-

Section 65(53a) of Finance Act, 1994

“Information technology software” means any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of a computer or an automatic data processing machine or any other device or equipment”

17. From the definition of manpower recruitment supply agency service noticed above, it can be seen that the activity should be recruitment or supply of manpower, temporarily or otherwise. The essence would be that the service provider who renders MRSA service would have no control or supervision on the work / job done by such persons supplied / recruited.

18. In the case of an assessee, who is engaged in services in the nature of development, maintenance and such software related activities, it is sometimes necessary to send their staff / qualified personnel to the location of the clients to carry out the services agreed upon. When the staff / skilled personnel is send by the assessee to the clients to carry out the software projects, in some cases, the control and supervision of such staff is with the client. In such cases, when the agreement is not for providing software projects but supply of qualified staff only such staff would be under the guidance and supervision of the client. The Tribunal in Future Focus Infotech India (P) Ltd. Vs. Commissioner of Service Tax, Chennai vide Final Order No. 246 & 247/2010 dated 3.3.2010 as reported in 2010 (18) STR 308 (Tri. Chennai), after analyzing the facts had held that when the staff / qualified personnel have to function under the overall supervision / control and management of the client, the services provided would be manpower supply service. On the very same day, the Tribunal in the case of Cognizant Tech Solutions (I) Pvt. Ltd. [Final Order No. 259/2010 dated 3.3.2010] had occasion to analyse a different set of facts. In Cognizant Tech Solutions, they were themselves responsible for the development, information technology software activities etc. and the client did not have any role of supervision, control or management over the staff / qualified personnel supplied. The agreement was for fulfilling development, information technology software activities to be done by Cognizant Tech Solutions. From the facts in Cognizant Tech Solutions, the agreement was for carrying out IT related services by Cognizant Tech Solutions though staff / qualified personnel were to carry out such activities in the premises of the client.

The Tribunal held that activity will not fall under manpower supply services.

19. Later, in another case, M/s. Future Focus Infotech Pvt. Ltd., for subsequent periodical demand, the Tribunal vide Final Order No. 41108/2018 dated 27.2.2018 had distinguished the decision rendered in Cognizant Tech Solutions. An argument was put forward during the hearing of that appeal by the counsel appearing for the appellant that there is a conflict in the decisions rendered by the Tribunal in their own case dated 3.3.2010 and the decision rendered in Cognizant Tech Solutions on the same date. A request was made to refer the issue to larger Bench. (Para 3(i) of the decision in Future Infotech Final Order dated 27.2.2018). The Bench looked into the facts of both these decisions and came to the conclusion that although on the first blush, the facts may appear similar, there is discernable differences. The Tribunal observed that M/s. Future Focus Infotech was providing manpower to their clients TCS, Infosys etc. and that the software or IT development was done only TCS, Infosys etc. It was concluded in Final Order dated 27.2.2018 that the activity rendered by the assessee would fall under MRSA and that the decision in Cognizant Tech Solutions will not apply.

20. The Tribunal in the appeal before us, in its earlier order dated 27.2.2019 while disposing the appeal had referred to both these decisions and also to the decision in the case of Coromandel Infotech India Ltd. Reported in 2019 (1) TMI 323 – CESTAT Chennai. In para 6 to 8 of the order in Coromandel Infotech India Ltd., the Tribunal has discussed in detail the discernible differences in the facts under dispute in Future Focus Infotech India Pvt. Ltd. and Cognizant Tech Solutions.

To be clear we would like to say that when the assessee is providing information technology software services to the clients, even though they supply staff / qualified personnel to the premises of their clients, the activity would not fall under MRSA. To the contrary, if the assessee is providing only staff / qualified personnel to the premises of the client and has no role in providing information technology software services, then the activity would squarely fall under MRSA.

21. With the above background, we may proceed to analyse Issue No. 4 as per the facts of this case. In para 6.10, the scope of work of various clients of the appellant has been summarized by the department. For better appreciation and analysis of facts, it would be worthwhile to reproduce the relevant part in para 6.10 of the Show Cause Notice with regard to the agreements entered by the appellant.

S. No.	Client Details	Scope of work / activity as per the Agreement / Purchase Order / Work Order / Email confirmation
(i)	ABN AMRO Bank	Software application development, application support and related services. Oracle RDBMS related technical performance review and improvement. 1. Review current tables, tablespaces, rollback segments and sizing them properly. 2. Apply Oracle partitioning, indexing (bit map, function based, COB), materialized views concepts wherever appropriate to have higher performance 3. Review and correct all Oracle init.ora parameter files 4. Review critical time taking queries and rewrite without affecting functionality to get performance. 5. Build batch process to collect stat to have COB of work better 6. Review current VB load programs and make necessary changes to get the benefit of partitioned tables rather than creating periodic multiple tables. For this assignment, two software engineers will work onsite at ABN AMRO Bank, Noida. One database specialist (Project Leader / Project Manager) would interact with the onsite team to provide the required guidance and monitor progress. For the purpose of commercials, it is assumed that this person would dedicate 50% of his working time for this purpose. Weekly reports

		would be provided to ABN AMRO Bank. The revised pricing for providing the recourses / assignment is INR 200,000. The rates for the resources are programmers (PL/SQL, BO)-INR85,000, Project Manager / BA – INR1,20,000
(ii)	Central Bank of India	Annual Maintenance Contract - Preventive and corrective maintenance of the computer systems / machines and will include supply and replacement of unserviceable parts - All maintenance / repairs shall be attended by the contractor (M/s. Sak Soft Ltd.) or authorized personnel of the contract. M/s. Sak Soft Ltd. Shall provide remote defect management support for the EBT-FX software used by Central Bank of India
(iii)	Citigroup Information Technology Operations and Solutions (CITOS)	<u>Service Agreement</u> Supplier (M/s. Sak Soft Ltd.) will provide CITOS software services such as Application Development, Testing and Quality Assurance, Support and Maintenance and Consultants on contract on a need basis
(iv)	GE Money (GE Capital Corporation)	<u>Master Services Agreement</u> 1. GE Capital Corporation, the company wishes to authorize the contractor (M/s. Sak Soft Ltd.) to perform certain software related services in accordance with this agreement. 2. The parties understand that the work to be undertaken by the contractor under this agreement will be performed in part by the employees of contractor and its controlled subsidiaries of controlled affiliates. 3. The contractor has the requisite skills, personnel and legal right to perform such software related services. 4. The contractor will ensure that prior to their employment of the personnel the contractor provides to work on the company's task orders are provided training that is adequate to ensure that they are proficient and able to discharge their duties as defined by such Task Order.
(v)	HDFB Bank	<u>Purchase Order</u> Dedupe Way Forward Reengineering & Dedupe System to Softcell Interface Services
(vi)	Punjab National Bank	<u>AMC & Software related works</u>
(vii)	Sak Consumer Retail Services Ltd.	Proposal for Investment Management Application Saksoft as solution providers have proposed an Automated Application for the business of Sak Consumer Retail Services Ltd. in Investment

		Management Application in their day to day business activities (Project Managers & Technical Team having strong skills and rich experience in developing, implementing and maintaining technologically advanced software solution). <table><tr><td>Phase</td><td>Description</td><td>Duration</td><td>Estimated Cost</td></tr><tr><td>1</td><td>Requirements</td><td>4 weeks</td><td>Rs.6,50,000/-</td></tr><tr><td>2</td><td>Construction</td><td>10 weeks</td><td>Rs.63,50,000/-</td></tr><tr><td>3</td><td>Customer acceptance</td><td></td><td>Rs.6,00,000/-</td></tr><tr><td>4</td><td>Deployment</td><td>6 weeks</td><td>Rs.6,00,000/-</td></tr><tr><td></td><td colspan="2">Total</td><td>Rs.82,00,000/-</td></tr></table>	Phase	Description	Duration	Estimated Cost	1	Requirements	4 weeks	Rs.6,50,000/-	2	Construction	10 weeks	Rs.63,50,000/-	3	Customer acceptance		Rs.6,00,000/-	4	Deployment	6 weeks	Rs.6,00,000/-		Total		Rs.82,00,000/-
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(viii)	Scope International Pvt. Ltd.	Professional Services Agreement Services and activities relating to back office transaction services relating to retail, credit cards, corporate, treasury operations etc. software development and activities relating to maintenance of software and hardware infracture. ➤ If any one of the personnel of service provider (M/s. Saksoft Ltd.) makes an application to join the organization (M/s. Scope International Pvt. Ltd.) and if she/he is found suitable for such appointment, M/s. Scope International Pvt. Ltd. Agree to reimburse M/s. Saksoft Ltd. With 10% of placement cost incurred by M/s. Saksoft Ltd. At the time of recruiting such employee ➤ In any eventuality of the contract being terminated by them before its expiry, M/s. Scope International Pvt. Ltd. shall have an option to recruit 50% of the total number of employees assigned by M/s. Saksoft Ltd. in the subject project assignment and any exception to the above shall be mutually discussed and agreed. In such case, M/s. Scope International Pvt. Ltd. Shall reimburse M/s. Saksoft Ltd. with 10% of placement cost incurred by M/s. Saksoft Ltd. at the time of recruitment. ➤ In respect of those of M/s. Saksoft Ltd. employees who have left the services of M/s. Saksoft Ltd and three months period have since lapsed, M/s. Scope International Pvt. Ltd shall have a right to recruit employees upon such application and in such an event no compensation as mentioned above shall be payable.																								
(ix)	Societe Generale Global Solution Centre Pvt. Ltd.	Consultant Service Agreement Creating and developing software, IT enabled service and IT consulting for its own banking group Societe Generale globally																								

(x)	Acsys Software India Pvt. Ltd.	Purchase orders towards provision of software manpower services Resource provisioning:- 1. Team Lead – 1 No.; Developers – 5 to 7 Nos. Tester – 1 No. The team shall predominantly work on converting a few existing software Applications into Dot Net Applications such as ➤ Extract the ASSP codes of existing applications ➤ Prepare project plan with mile stones ➤ Build them into Dot Net Applications with design changes if necessary ➤ Prepare test cases and perform unit testing as well as system level testing ➤ Implementing the Applications ➤ Documentation ➤ Any other software design, development and implementation related activity
(xi)	Baja Allianz	Java developer to Application support and enhancement of the web application
(xii)	ING Vysya Bank Ltd.	Service Provider Agreement ING Vysya Bank Ltd. is engaged in the business of providing banking services and intends to outsource people in its supporting functions. Saksoft is engaged in the business of software services which includes software application development, testing services, application support services, staff augmentation and software products. <u>Scope of Services:-</u> ➤ Creating universes with multiple database and to develop reports in BO applications ➤ Develop better reporting procedures to maximize the business growth ➤ Decision on Business Objects related problems like developing the reports, load balancing, query design and maintenance of BO Server ➤ Develop periodical reports to maintain the integrity of data on a continuous basis. Develop MIS and charts / graphs / dash boards and other reports in a presentable format to management executives ➤ Monitor the progress of the data integrity of the bank and help in developing ➤ To resolve the BO server technical and architectural issues ➤ To maintain the users and client requirements for BO ➤ To develop the Bo universes and help team members to produce the reports from the client

		➤ To provide on the job consultancy / clarify to other team members on issues connected to BO and crystal reports ➤ Software design / programming / writing / debugging / modifying / business analysis / project management (one or more or all of these activities) for the products and subsystems of client ➤ Troubleshooting & maintenance of reports
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(i) **ABN AMRO Bank**

From the second column which mentions the scope of work, it can be seen that the agreement is for software application development, application support and related services etc. On perusal of the agreement entered by the appellant with ABN AMRO Bank, in page 634 of the compilation, clause 4 reads as under:-

(a) The contractor agrees that the contractor shall through supervisors appointed by the contractor, supervise and control the work of all the employees engaged by the contractor for the purpose of carrying out the obligations under this agreement and shall be fully responsible for maintaining the discipline, peace, good behavior, dealings and appearance of the contractor's employees who are deployed at the ABN AMRO premises.

(b) In the event of the work carried out by the contractor or the contractor's employees is not found to be satisfactory, the contractor upon notification from the ABN AMRO shall immediately take all necessary steps so as to provide prompt and effective services.

(c) The contractor agrees that the employees engaged by the contractor shall be permitted to remain on the premises of the ABN AMRO as per the timings indicated by the ABN AMRO. However, prior permission will have to be obtained by the contractor / the contractor's supervisors from the ABN AMRO in the event of the contractor's employees being required to remain on the ABN AMRO's premises beyond the aforesaid stipulated time and / or on Sundays and fixed public holidays for any reason whatsoever."

From the agreements, it can be seen that the control and supervision of the staff / qualified personnel supplied to the premises of the client

(ABN AMRO Bank) is with the appellant (contractor) only. Though certain personnel are supplied to the premises of the client for carrying out work / job of the client, it cannot be said that the activity would fall under MRSA.

(ii) **Central Bank of India**

The scope of work summarized in second column mentions only maintenance work. It may be necessary to send qualified personnel to the premises of the client to carry out maintenance work of the computer systems / machines. The control and supervision of staff remain with appellants and therefore will not fall under MRSA.

(iii) **Citigroup Information Technology Operations and Solutions (CTIOS)**

It is clearly noted in Col. 2 that the scope of work is to provide software services such as application development, testing and quality assurance etc. After perusal of the agreement, the department has comprehended the scope of work and mentioned the same in this column. The scope of work does not show anything related to MRSA.

(iv) **GE Money (GE Capital Corporation)**

The department has heavily relied upon the clause in the agreement that the appellant / contractor has requested for skills, personnel and legal right to perform such software related services. On perusal of the master services agreement in page 682, it reads as under:-

"The contractor is not obligated to sign and accept the Company's task Orders, however, the contractor will use its best efforts to accept such Task Orders and fulfill its requirements. Once the contractor accepts a Task Order, the contractor must perform the work specified in such Task Order. In performing such work and subject to this agreement or Task Order, the contractor shall be free to exercise its discretion as to the method and means of performance of its services. The Task Order could be a Fixed Price engagement or a Time and Material engagement."

Clause 3.2, 3.3 and 3.4 reads as under:-

"3.2 The contractor will be entirely responsible for staff selection and hiring in order to fulfill the task orders, including, without limitation, determining and hiring the appropriate mix of skill types and expertise levels. However, the company may, at its sole discretion, review sample resumes and capabilities and interview key personnel (identified in the relevant task order) assigned to Fixed Price and Time and Material engagements and advise the contractor as appropriate. Further, the contractor shall be solely responsible for all matters in connection with its personnel (including, without limitation, provision of salary, benefits, training, promotions and provision of visas, work permits, housing and related matters while on-site).

3.3 The contractor will make available additional resources that could be used to staff unexpected, even temporary, increases in the forecasts. These additional resources will be committed to the task once the contractor has accepted the confirmed task orders.

3.4 The contractor will be solely responsible for maintaining satisfactory standards of personnel competency, conduct and integrity and for taking such disciplinary action with respect to all such personnel as may be required under the circumstances.

Further, in clause 3.8 to 3.10, the agreement reads as under:-

"3.8 The contractor will ensure that prior to their deployment, the personnel the contractor provides to work on the company's task orders are provided training that is adequate to ensure that they are proficient and able to discharge their duties, as defined by such task order. The company reserves the right to require the contractor to provide training specific to the execution of task orders, free of cost to the company, if personnel are either inadequately trained or need specialized training for the execution of task orders at the company's discretion.

3.9 The company follows ISO 9001:2000 methodology of quality management, measurement and continuous improvement. The contractor's endeavor is to be accredited on SEI-CMMi model in the next 12-month period. The contractor would look at Six Sigma methodology thereafter.

3.10 The contractor shall at all times select the most appropriate model of operation which could be a combination of nearshore, Offshore and Onsite resources."

From the above clauses in the agreement, it can be seen that the appellant who is the contractor mentioned in the agreement is responsible for carrying out software related services and has to use the best skilled personnel to perform such services. The control and supervision of the staff / qualified personnel supplied at the premises of the client is wholly on the appellant. For these reasons, the activity will not fall under MRSA.

(v) **HDFC Bank**

It is seen from the show cause notice itself, that the work order is for software annual maintenance services. The relevant portion of the agreement is noticed as under:-

(A) "HDFC Bank is a banking company and wishes to obtain maintenance services for the various software applications developed and deployed by Saksoft under CC Offline and Way Forward Projects.

(B) The supplier has expertise in providing maintenance services in relation to software of various kinds and has represented to HDFC Bank that it is able to provide such services.

(C) The parties have therefore agreed that the supplier shall provide maintenance services to HDFC Bank in relation to software in accordance with the terms and conditions of this agreement. This agreement accordingly describes the scope of the services and the rights and obligations of the parties in relation to the provision of those services.

Staff

(a) The supplier agrees that during the term of this agreement and for a period of six months after its termination, the supplier shall not make an offer of employment to any staff of HDFC Bank in connection with the performance of this agreement without the prior written consent of the Authorized Representative of HDFC Bank.

(b) It shall be the responsibility of the supplier to appoint and delegate appropriate staff for performing the services under this agreement. All such staff shall at all times be treated as employees of the supplier.

(c) The supplier shall ensure that at all times during the term of this agreement it shall have sufficient staff as may be necessary to fulfill its obligations under this agreement.

(d) It shall be the responsibility of the supplier to ensure that the staff while on a project or otherwise assisting the supplier in providing services under this agreement shall dedicate sufficient time and effort as may be required for such services."

From the above conditions in the agreement, it can be seen that the control and supervision of the staff / qualified personnel supplied at the premises of HDFC Bank solely rests with the appellant herein. The activity cannot fall within the definition of MRSA.

(vi) **Punjab National Bank**

It is stated in Col. 2 that the scope of work is annual maintenance contract and software related works only.

(vii) **SAK Consumer Retail Services Ltd.**

From Col. 2 of the show cause notice, it is seen that the work order is for automated application for the business of the client.

(viii) **Scope International Pvt. Ltd.**

In Col. 2 of the show cause notice, it is mentioned that the services and activities related to back office transaction services relating to retail, credit cards, corporation, treasury operations etc. software development and activities relating to maintenance of software and hardware infrastructure. On perusal of the agreement entered by the appellant with the Scope International Pvt. Ltd., page 286 reads as under:-

(a) "Scope desires and requires to avail services of the service provider which require special care, skills, knowledge, experience, expertise and capability to perform some ancillary tasks

(b) The service provider is capable and competent to provide such ancillary service and is willing to undertake assignments from Scope.

(c) Now, therefore, in consideration of the mutual covenants and conditions contained herein and for any other good and valuable consideration, the sufficiency of which is hereby acknowledge, the parties agree as follows."

In page 292 of Vol. I of the appeal book, clause 7.2.5 and 7.2.6 reads as under:-

"It shall be the sole and exclusive responsibility of the service provider to carry out the assigned task effectively and as efficiently as agreed to and entered into with Scope by this agreement. Service provider shall upon the request of Scope take adequate measures to rectify, if in the opinion of Scope, the services provided by service provider are not satisfactory.

The service provider shall ensure that all of its personnel will at all times, during the term of this contract while on Scope's premises:-

- *Act diligently, ethically, soberly and honestly*
- *Not take or use any drug unless prescribed by a medical practitioner or lawfully available without prescription and used in accordance with directions*
- *Comply with all occupational health or safety policies of Scope including (but not limited to) those relating to a smoke free work environment during the course of their presence in the premises whenever required*
- *Company with all procedure, rules, regulations, standards of conduct and lawful requirements of Scope in respect of use of its premises, equipment, business ethics or methodology or contact with its staff or Scopes while being on the premises as desired by Scope.*
- *Not otherwise act in any manner, which could disrupt or adversely affect Scope's business reputation, interests or goodwill."*

From the above clauses, it can be seen that the appellant was engaged in providing software related services to Scope and all the staff / qualified personnel supplied to the premises of Scope are under the

control and supervision of appellant only. The activity therefore cannot fall under MRSA.

(ix) **Societe Generale Global Solution Centre Pvt. Ltd.**

It is seen from the facts mentioned in Col. 2 that the services was for creating and developing software.

(x) **Acsys Software India Pvt. Ltd.**

From the description of work in the second column of the show cause notice, it is clear that the activity is IT related services.

(xi) **Bajaj Allianz**

The agreement is for Java developer to application support and enhancement of the web application which is nothing but IT related services.

(xii) **ING Vysya Bank Ltd.**

The scope of services mentioned at Col. 2 would show that the activities rendered by the appellant are various types of IT related services including maintenance.

22. It is pertinent to say that in the Order in Original, the original authority has discussed the agreements in regard to three clients only. Para 12 of Order in Original, contains the findings with regard to manpower recruitment or supply agency service. Only the facts with regard to GE Capital Corporation, ABN AMRO Bank, Societe Generale Global Solution Centre Pvt. Ltd. has been taken up for discussion by the original authority. In para 12.6, it is stated by the original authority that the contention of the appellant that all the staff / qualified personnel employed by them are on their pay rolls and not in the pay rolls of the clients to be untenable. In fact, this is the underlying essence of control and supervision which distinguishes the facts in

Future Focus Infotech and Cognizant Tech Solutions. When the personnel is supplied to the premises of client and the employees still remain in the payroll of appellant, would strongly indicate that there is no provision of MRSA services. From the discussions made by the original authority, it is seen that he is carried away by misconstruing the clarifications issued by the Board by Circular F. No. B1/6/2005-TRU dated 27.7.2005 wherein supplying staff / qualified personnel to the premises of the client would be supply of manpower. The discussion in para 12.3 indicates that mere supply staff / qualified personnel to premises of client is construed as MRSA by the lower authority which is erroneous. Even if parties agree that consideration will be based on the number of persons employed, what has to be looked into is whether the agreement is to execute the work for the client or merely supply the work force. What has to be examined is the core activity for which the agreement is entered between parties. The clients are not in IT related fields. They need services in the nature of annual maintenance of systems, testing, developing of software etc. The disputed transactions as per agreement do not reflect ingredients required for MRSA.

23. Show Cause Notice is the genesis of the litigation and the tax demand. As per para 6.10 of the Show Cause Notice, various clients have been mentioned which constitute the demand under MRSA. We have examined these transactions in the light of Show Cause Notice and documents placed before us. The Id. AR during the course of argument had submitted that some of the agreement would definitely fall under MRSA. Though the Bench requested to point out which of the clients would fall under MRSA, she was not able to clarify. Later, on

15.1.2021, after the orders were reserved, the Id. AR filed a short written additional submission stating that some of the agreements are not available with her and that the appellant has to be given time to submit documents. The appellant has not requested for any time and completed the arguments. In fact, as per the remand order of the Hon'ble High Court, the matter was listed on 12.1.2021. The Id. AR Smt. T. Usha Devi requested for time and the same was adjourned to 13.1.2021. On this day also during hearing as stated earlier, even though she put forward a contention that agreement of some of the clients would fall under MRSA she was not able to clarify or support her contention. In the written additional submissions, Id. AR has discussed the agreement entered with Barclays Bank. In fact, there is no mention of Barclays Bank under MRSA in Show Cause Notice. The agreement with Barclays Bank is in regard to other service and not MRSA. The Id. AR has not studied the facts seriously or sufficiently. Being rehearing as per direction of Hon'ble High Court, we cannot refrain from stating so. The department has issued Show Cause Notice after several correspondences with the appellant and after going through the documents. The adjudicating authority has also passed the order after perusing the agreements.

24. Be that as it may, the Id. Counsel for appellant has also raised an argument that the demand under MRSA cannot sustain for the period prior to 16.5.2008 when the transactions of the very same nature have been subjected to service tax under Information Technology Software Services after such services became taxable. It is to be stated that ITSS is not a category carved out of MRSA. The MRSA was introduced on 16.6.2005. When the department has not

objected to the classification of the services under ITSS after 16.5.2008 and has accepted the appellant's classification, they cannot demand service tax under a different category for transactions of the very same nature for the period prior to introduction of ITSS. In Indian National Shipowners Association (*supra*), the Hon'ble Supreme Court had categorically held that when a specific new service is introduced without carving out from the existing service category, such service can be liable to service tax only from the date of introduction of the new service. On this ground also, the demand under MRSA cannot sustain.

25. On scrutiny of the show cause notice and the evidences placed before us, we have to say that there is no iota of evidence to show that the appellants were rendering MRSA service during the disputed period. On merits, we hold that the issue is settled by the decision in the case of Cognizant Tech Solutions cited *supra*. The demand under MRSA cannot sustain and requires to be set aside which we hereby do.

26. The Hon'ble High Court has remanded the matter to reconsider the issue on limitation also. The entire demand is raised invoking the extended period. In Coromandel Infotech India Ltd., the Tribunal had occasion to consider the issue of limitation when there were two conflicting views on the very same issue. Moreover, in the case before us, apart from bald allegation that the appellant has suppressed facts with intention to evade payment of service tax, there is no positive act brought out before us to establish the allegation of suppression. From page 80 onwards of Paper Book – I (filed along with the appeal), the appellant has enclosed the various correspondences between the appellant and department prior to issuance of show cause notice. On

14.9.2009, letter issued by the department to the appellant requesting to furnish documents. On 18.9.2009, the appellant has replied enclosing all the documents as requested by the department. On 29.9.2009, a further letter is issued to the appellant requesting for break-up details with regard to the income earned on software and foreign exchange expenditure incurred by them. On 29.9.2009, the appellant has replied to this letter along with Annexure I giving the details. On 5.10.2009, a further letter is issued by the department to appellant asking details with regard to maintenance or repair services, information technology software services etc. To this letter, the appellant has replied on 9.10.2009 giving the details as requested. On 14.10.2009, another letter is issued by the department to the appellant asking for further details. The appellant has replied on 18.11.2009 with necessary enclosures explaining their contentions. On 26.11.2009, a letter is issued by the department in respect of input service credit adjustment and also maintenance or repair service details. To this appellant replied on 30.11.2009. A further letter is issued on 22.12.2009. From the above correspondences between the parties, it is evident that the appellant was all along responding and cooperating with the department. The show cause notice is issued only on 23.4.2010. We do not find any evidence to support the allegation that the appellant has suppressed facts with intention to evade payment of service. The Id. counsel for appellant has relied on the decision of Hon'ble Supreme Court in Continental Foundation Jt. Venture Vs. CCE 2007 (216) ELT 177 (SC). In para 11 and 12, the Hon'ble Supreme Court has held as under:-

"11. Factual position goes to show the Revenue relied on the circular dated 23.5.1997 and dated 19.12.1997. The circular dated 6.1.1998 is the one on which appellant places reliance. Undisputedly, CEGAT in Continental Foundation Joint Venture case (supra) was held to be not correct in a subsequent larger Bench judgment. It is therefore clear that there was scope for entertaining doubt about the view to be taken. The Tribunal apparently has not considered these aspects correctly. Contrary to the factual position, the CEGAT has held that no plea was taken about there being no intention to evade payment of duty as the same was to be reimbursed by the buyer. In fact, such a plea was clearly taken. The factual scenario clearly goes to show that there was scope for entertaining doubt and taking a particular stand which rules out application of section 11A of the Act.

12. As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word 'willful', preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty'. Therefore, there cannot be suppression or mis-statement of fact which is not willful and yet constitute a permissible ground for the purpose of the proviso to Section 11A. Mis-statement of fact must be willful"

For this reason, the appellant succeeds on limitation also.

27. Issue No.4 is found in favour of the appellant with consequential relief, if any.

(Pronounced in open court on 24.02.2021)

(SULEKHA BEEVI C.S.)
Member (Judicial)

(P. ANJANI KUMAR)
Member (Technical)