

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
CHENNAI

REGIONAL BENCH – COURT No. III

(1) SERVICE TAX APPEAL No. 266 of 2011

(Arising out of Order-in-Appeal No.7/2011 (MST) dated 31.01.2011 passed by the Commissioner of Central Excise (Appeals), No.26/1, Mahatma Gandhi Marg, Nungambakkam, Chennai 600 034)

M/s.Talking Technologies (P) Ltd.

... Appellant

857, Poonamalee High Road,
 Kilpauk,
 Chennai 600 010

Versus

Commissioner of GST & Central Excise,

... Respondent

Chennai North Commissionerate
 No.26/1, Mahathma Gandhi Road, Nungambakkam,
 Chennai 600 034.

WITH

(2) SERVICE TAX APPEAL No. 285 of 2012

(Arising out of Order-in-Appeal No.21/2012 (MST) dated 16.02.2012 passed by the Commissioner of Central Excise (Appeals), No.26/1, Mahatma Gandhi Marg, Nungambakkam, Chennai 600 034)

M/s.Talking Technologies (P) Ltd.

... Appellant

857, Poonamalee High Road,
 Kilpauk,
 Chennai 600 010

Versus

Commissioner of GST & Central Excise,

... Respondent

Chennai North Commissionerate
 No.26/1, Mahathma Gandhi Road, Nungambakkam,
 Chennai 600 034.

APPEARANCE:

Mr. N. Viswanathan, Advocate
 For the Appellant

Mr. M. Ambe, Deputy Commissioner (A.R)
 For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI, C.S. MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

DATE OF HEARING : 29.05.2023
DATE OF DECISION : 05.06.2023

FINAL ORDER No. 40397-40398/2023

Order : Per Hon'ble Ms. Sulekha Beevi C.S.

The issue involved in both these appeals being the same are heard together and disposed of by this common order.

2. The appellant is engaged in the service of providing commercial training or coaching services and is registered with the department. They are also franchises of M/s.NIIT. During the visit by internal audit team of the department, it was found that the appellant was providing infrastructure facilities like computer systems, refreshments, lunch etc. to their corporate clients for which though appellant is liable to pay service under the category of "Business Support Service" (BSS), they had not discharged any service tax on the consideration received for providing such infrastructure facilities. It was also noticed that the appellant received consideration towards supply of employees as per the requirement of their client viz., M/s.WTI Advance Technologies Ltd. (WTI, for short). The said activity is taxable under the category of "Manpower Recruitment and

Supply Agency Service" (MRSS). The appellant had not discharged service tax under this category also. Show cause notice dated 28.01.2008 was issued for demanding the service tax for the period May 2006 and March 2007 under BSS and June 2005 to May 2007 under MRSS. The show cause notice was adjudicated vide OIO dated 31.07.2008. Aggrieved by the order of the adjudicating authority, appellant preferred appeal before Commissioner (Appeals) who vide OIA dated 31.01.2011 upheld the OIO. The said show cause notice and the impugned orders therein is the subject matter of Appeal No.ST/266/2011.

3. The appellant was issued another show cause notice dated 29.09.2008 demanding service tax under "Commercial Training or Coaching Service" (CTCS) for the period April 2007 to March 2008. So also, demand was raised under MRSS for the period April 2007 to March 2008. After due process of law, the original authority vide Order-in-Original dated 27.11.2009 confirmed the demand along with interest and imposed penalties. Aggrieved by such order, the appellant filed appeal before the Commissioner who vide OIA dt. 16.02.2012 upheld the confirmation of demand. Aggrieved, appellant has filed Appeal No.ST/282/2012 before the Tribunal.

4. Ld. Counsel Shri N. Viswanathan appeared and argued on behalf of the appellant. Ld. Counsel adverted to the definition of "Business Support Service" under Section 65 (104c) of the Finance Act, 1994 which reads as under :

“Support service of business or commerce” means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment of services, information and tracking of delivery schedule, managing distribution of logistics, customer relationship management services, accounting and processing of transactions, operational assistance for marketing, formulation of customer service and pricing policies, infrastructural support services and other transaction processing”.

Further, under Section 65 (zzzq) of the Finance Act, 1994, taxable service means ‘any service provided or to be provided to any person, by any other person, in relation to support services of business or commerce, in any manner’. In letter No.334/4/2006-TRU dated 28.05.2006, the Central Board of Excise & Customs has explained the object and purpose of BSS. It is explained therein as under :

“Business entities outsource a number of services for use in business or commerce. These services include transaction processing, routine administration or accountancy, customer relationship management and tele-marketing. There are also business entities which provide infrastructural support such as providing instant offices along with secretarial assistance known as “Business Centre Services”. It is proposed to tax all such outsourced services”.

5. Ld. Counsel urged that as per the above circular, it can be seen that the intention of the government is to levy service tax on outsourced services wherein office infrastructures are provided. In the case of the appellant, only class rooms along with its infrastructure is given on rent on daily basis to give lectures by eminent personalities to the employees. Appellant only collects rent for renting out the class room. The appellant has not provided any infrastructure support for conduct of an office. The class rooms having been leased out to the organizations which conduct

classes / lectures in these class rooms, the amount received by appellant cannot be considered as consideration received for providing BSS. The class rooms leased out / given for rent on daily basis cannot be considered as infrastructure facilities given for regular transactions of business. The appellant is neither providing office facility nor are they providing any of the specified facilities along with the classroom. The activity therefore does not fall within the levy of service tax under the category of "Business Support Service".

6. In regard to the demand under MRSS, it is explained by the Ld. Counsel that as per the agreement entered by them with WTI, it has been clearly specified under clause 3(b) of the agreement that the appellant and their employees will perform all activities commonly known and referred to as consultancy services involving GIS, CAD /CAM and other commonly known activities. Further, under clause 12 (d) of the agreement, it has been provided that if the appellant terminates the agreement with work incomplete, then WTI shall be entitled to obtain performance of that work by any other means at the risk, charge and cost of the appellant. It can be seen from these clauses of the agreement that the appellant is not merely supplying the manpower but has undertaken an obligation to perform the services under a contract for software services. Though the appellant has collected charges from WTI on man-hour basis it is merely a measure of the value of services which is usually adopted in the consultancy industry where time spent is a crucial factor.

Ld. Counsel submitted that there is no service provider and service recipient relationship between the appellant and WTI.

7. It is argued by the Ld. Counsel that though it is alleged in para-7 of the show cause that the appellant has supplied staff to WTI for customization of software, it is not explained as to how the department has arrived at the conclusion that the appellant has only supplied staff to WTI. It is not explained in the SCN how the activity would fall under the definition of "Manpower Recruitment or Supply Agency Service"; that in the SCN it has not been explained how clauses (3) (4) & (6) of the Business Associate Agreement entered between the appellant and WTI on 1.7.2006 would indicate that the appellant only supplied staff to WTI. There was no sufficient clarification in the SCN to help the appellant provide details of allegations. The demand raised is not sustainable.

8. In appellant's own case vide Final Order No.40679/2020 dt. 03.03.2020 for the subsequent period from 01.04.2008 to 31.03.2009 the very same issue as to whether the appellant has rendered taxable service of "Manpower Recruitment or Supply Agency Service" to WTI was considered. The Tribunal followed the decision in the case of *M/s.Future Focus Infotech India (P) Ltd. Vs CST Chennai* - 2010 (18) STR 308 (Tri.-Chennai) and upheld the demand confirmed by the adjudicating authority. It is submitted that against the said order of the Tribunal, the appellant has filed C.M.A.No.383 of 2021 before the Hon'ble High Court of Madras. Vide interim order dated 17.02.2021, the Hon'ble High Court had granted interim stay of the Order-in-Original dated 11.03.2011 till the next date of

hearing i.e. 03.06.2021. It is submitted that the Order-in-Original being stayed by the Hon'ble High Court, the ratio of the decision of the Tribunal would not be applicable to this appeal which is for a different period.

9. Without prejudice to the claim that the amount received by them from NIIT is only towards renting of the class room to NIIT and that demand would not fall under the category of BSS, it is explained by the Ld. Counsel that said taxable service under BSS will not apply for providing tea & snacks to the students / lecturer which will only attract services under "Outdoor catering services" or "renting of movable goods" which is not at all a taxable service.

10. An amount of Rs.4,725/- along with Education Cess (Rs.95/-) and Secondary Higher Education Cess (Rs.47/-) has been confirmed for the period April 2007 to March 2008 under 'Commercial Training or Coaching Services'. It is submitted that the training courses were conducted by NIIT and therefore appellant is not liable to pay the service tax.

11. Ld. Counsel also argued on the ground of limitation. It is submitted that the issue being one of interpretation of law and when it is shown that there are different views expressed by the Tribunal on the very same issue with regard to MRSS, the demand raised invoking the extended period cannot sustain. The authorities below have alleged that the appellant has suppressed facts with intent to evade tax, as the short payment of tax would not have come to light, but for the visit and verification by the audit officers. Ld. counsel submitted that there is no conscious or deliberate intention to evade the payment of tax. The demand which is beyond the

period of one year ought to be set aside. He prayed that the appeal may be allowed.

12. Ld.A.R Shri M. Ambe appeared and argued on behalf of the Department. It is submitted by the Ld. A.R that on scrutiny of ledger accounts by the audit, it was noticed that under the head 'infrastructure Revenue' and 'Infrastructure Overheads', the appellant had received an amount of Rs.13,96,997/- during the period from May 2006 to March 2007 for providing class room with infrastructure like computer systems, refreshment, lunch etc. to corporate clients. As the appellant themselves have accounted it as 'Infrastructure Overheads' and 'Infrastructure Revenue' it is clear that this is the consideration received from NIIT for providing class room infrastructure facility. This activity will very well fall under BSS w.e.f 01.05.2006. Accordingly, the appellant is liable to pay service tax under the said category. The details of the revenue collected for providing infrastructure facility as class room is given in Annexure-A of the SCN.

13. The argument put forward in regard to MRSS was countered by the Ld. A.R adverting to various clauses of the agreement entered between the appellant and M/s.WTI.

14. Section 65 (68) of the Finance Act, 1994 defines "Manpower Recruitment Agency" as any person engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of man power, temporarily or otherwise to a client.

15. The taxable service of "Manpower Recruitment or Supply Agency Service" has been defined under the Act as a service, provided or to be provided to a client, by manpower recruitment or supply agency in relation to the recruitment or supply of manpower temporarily or otherwise in any manner. Thus, a service becomes taxable under Manpower Recruitment or Supply Agency Service when the service is in relation to supply of manpower to a client though temporarily. The service rendered by the appellant includes technical assistance in respect of computer application software system development, implementation and maintenance work undertaken by WTI from its various clients and they also depute its employees to WTI / clients of WTI at various locations to work on the project along with WTI project team. This activity of the appellant is nothing but supply of manpower to their client M/s.WTI.

16. As per clause 3 (a) of the Business Associate agreement it is seen that upon request of WTI, the appellant will offer other services of its selected / skilled employees to work on the projects identified and allocated by WTI at its sole and absolute discretion and to carry out such functions and project related activities as may allocated by WTI from time to time on a fixed monthly fee basis. Para 6.1a of agreement states that WTI will pay to the appellant an amount as agreed. A person month shall consist of minimum of (8) hours per day multiplied by number of working days in a calendar month at the location of work. Para 6.1 (d) stipulates that the employee shall not be entitled to any overtime charges or to work on any holidays as a compensation for leave taken or absence from work on any other working days.

17. As per Clause 6.1 (c) of the agreement, it is stated that all payments to the appellant will be made on a monthly basis against bills / invoices within 30 days of production of bills / invoices and the payment shall be made after deduction of all applicable taxes. It is clear from the agreement that appellant has provided Manpower Recruitment or Supply Agency service to M/s.WTI. The appellant is trying to argue that they are rendering ITSS services and that the activity will not fit into the definition of 'MRSS'. The nature of relationship between the appellant and with the clients of WTI, to whom the services are provided is established. The appellant deposes its employees to provide services to M/s. WTI and their clients. Appellant received payment for deposing such employees. The appellant has contended that the rate is fixed as a measure of value of the services which is usually adopted in the consultancy industry which itself is a clear indication that the service rendered is Manpower Recruitment or Supply Agency Service. It is submitted by Ld. A.R that the authorities have therefore rightly confirmed the demand.

18. On the issue of demand of service tax under Commercial Training or Coaching services, the Ld. AR submitted that appellant has received consideration from NIIT which is part of the fees collected for imparting computer training courses. The demand therefore is legal and proper.

19. The argument put forward on the ground of limitation was countered by the Ld. A.R. It is submitted that short payment of service tax on the above these categories of services would not have come to light but for the verification by the audit party. The appellant has deliberately

suppressed facts with intention to evade payment of tax and therefore demand raised for the extended period is legal and proper.

20. Heard both sides.

21. The issue that arises for consideration is whether the appellant is liable to pay service tax as demanded in the SCNs under "Business Support Services", "Man Power Recruitment or Supply Agency Service" and "Commercial Coaching & Training Services".

22. Ld. Counsel has vehemently argued that the SCNs being bereft of the details as to how the activity would fit into the definition of "BSS" and "MRSS", the appellant has been prejudiced as they were not able to put forward proper defence and counter the allegations. To support such an argument, Ld. Counsel has relied upon the decision of the Hon'ble Supreme Court in the case of *Commissioner of Central Excise, Bangalore Vs Brindavan Beverages (P) Ltd.* 2007 (213) ELT 487 (SC) as well as the decision in the case of *Oryx Fisheries Private Ltd. Vs Union of India* - 2011 (266) ELT 422 (SC). We do not have any quarrel with the proposition that a SCN has to contain details of allegations raised against the assessee. On perusing the SCN issued by the department on 28.01.2008 as well as on 27.11.2009, it is seen that the department has indeed explained how the income received by them would fall under various categories of services. The definition of these services have been stated in the SCN and how consideration received from NIIT as well as from WTI would be taxable under (1) Business Support Service, Commercial Training or Coaching Service (2) Man Power Recruitment or Supply Agency Service.

23. In the SCN dated 29.09.2008 one demand is made under the category of "Commercial Training or Coaching Service" based on the income received from NIIT. In paras 3 (1) to (3) the allegation is as under :

"3 (1) M/s.TTPL through M/s.NIIT executes the computer training and they collect fees from M/s.NIIT Ltd. for the same. M/s.TTPL claimed those income earned under the head '**Indirect Income**'. M/s.TTPL have not paid Service Tax on the fees collected for the Service rendered by them. IT was informed by the M/sTTPL vide their letter dated : 01-08-2008, that they have collected an amount of **Rs.39,375/-** during the year 2007-2008 towards computer training provided to M/s.NIIT.

(2) As per Section 65 (26) of the Act "**Commercial Training or Coaching**" has been defined as "Commercial Training or Coaching" means any training or coaching provided by a commercial training or coaching centre. Also, as per Section 65 (27) "Commercial training or coaching centre' means any institute or establishment providing commercial training or coaching for imparting skill or knowledge or lessons on any subject or field other than the sports, with or without issuance of a certificate and includes coaching or tutorial classes but does not include preschool coaching and training centre or any institute or establishment which issues any certificate or diploma or degree or any educational qualifications recognized by law for the time being in force.

(3) In view of the above definition, it appears that the computer Coaching service provided by M/s.TTPL to M/s.NIIT falls under "**Commercial Training or Coaching**" and M/s.TTPL are liable to pay service tax on the amount of Rs.39,375/- collected from M/s.NIIT during the year 2007-2008. Towards computer training provided to M/s.NIIT."

24. So also in the SCN dated 28.1.2008 in paras 4 to 7 along with Annexure-A to the SCN, the details of income received by the appellant and as to how these amounts would be subject to levy of service tax under the category of BSS and MRSS are explained. We find that the argument of the appellant that SCN does not furnish required details for the appellant to rebut or defend the allegation is without any substance.

The SCN cannot be too hyper-technical so as to make it highly confusing and too hard for an assessee to comprehend. When the details of the income (along with Annexure) which is subject to service tax is furnished in the SCN, and the category of services is also given along with its definition, the assessee should be sufficiently able to understand the allegations and defend the notice. The argument put forward by the Ld. Counsel that SCN is bereft of details and therefore appellant did not get reasonable opportunity to defend the case and therefore SCN is itself invalid, does not find favour with us.

25. The first issue is with regard to the demand under 'Business Support Service'. The appellant does not dispute that the premises of the class room along with its infrastructure were used by NIIT for conducting computer classes. The argument put forward before us is that appellant has given the premises on rent along with its infrastructure facilities to NIIT. However, the appellant has not been able to establish this argument with supporting evidence in the nature of lease / licence deed or rent receipts. The said contention of the appellant is neither tenable nor acceptable. We therefore hold that the demand under BSS is sustained.

26. The second issue is with regard to the demand under 'Manpower Recruitment or Supply Agency Service'. The very same issue was considered by the Tribunal in the appellant's own case and vide Final Order No.40679/2020 dated 03.03.2020, the Tribunal has upheld the demand. The various clauses in the agreement executed between the

appellant (BA) and M/s. WTI on the analysed and appreciated by the Tribunal. The discussions are reproduced as under :

6. The moot point for consideration is whether the activity would fall within the definition of "Manpower Recruitment and Supply Agency Service". For better appreciation, the said definition is reproduced as under :

"SECTION 65. Definitions. — In this Chapter, unless the context otherwise requires, -

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[(68) "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];]"

7.1 The following clauses in the agreement entered between the appellant (BA) and M/s. WTI would bring out the nature of the transaction :

"WHEREAS, WTI, among other business, is in the business of developing, constructing, licensing, updating, enhancing, implementing, maintaining, supporting and marketing computer application software system;

AND WHEREAS, BA has represented to WTI that it has a pool of highly skilled and specialized Employees experienced in the development, enhancement, implementation and maintenance of Software Projects and proposed to WTI that it is willing to provide on subcontract basis technical assistance in respect of computer application software system development, implementation and maintenance work undertaken by WTI from its various clients by deputing its Employees to WTI/WTI Client locations to work on the project along with WTI Project team.

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3. SCOPE OF BA ACTIVITIES: As WTI' Business Associate, BA shall engage in the following activities with due diligence;

a) Upon the request of WTI, BA will offer the technical assistance to WTI through services of its selected Employees to work on the computer software application development, implementation and maintenance of specific projects to be identified and allocated by WTI

at its sole and absolute discretion and to carry out such functions and project related activities as may be allocated by WTI from time to time on a fixed man month (consisting of all days in a month excluding weekly offs and holidays declared by WTI or its Clients) fee basis as hereunder agreed under overall guidance and supervision of WTI, as per terms of this agreement.

b) BA and its Employees on the project will perform all activities commonly known and referred to as "Software Development and Maintenance" activities. Such activities include without limitation development, installation, demonstration, Parameters Setting, User Training, Providing Guidance to User, warranty support functions, etc. The Employees deputed by BA will also perform such other functions as may be called upon to do by WTI from time to time.

c) BA shall secure all necessary registrations, authorizations and licenses as required to formalize its appointment hereunder or engagement of Employees by it and fully comply with from time to time and at all times all rules, regulations and laws as may be applicable to performance of its obligations and/or the obligations of its Employees hereunder.

d) BA and its Employees assigned by WTI to its clients shall, at all times, comply with security and confidentiality policies and procedures of WTI and clients.

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6. CONSIDERATION

6.1. For the work to be carried out by BA for WTI, WTI shall pay BA technical fees as under:

a) WTI will pay to BA at the rates agreed in terms of Schedule of Technical Fees attached hereto. A person month shall consist of minimum eight (8) hours per day multiplied by number of working days in a calendar month at the location of work.

b) In case of deputation of BA Employees on overseas assignments, WTI shall bear all expenses connected with visa, travel and pay the living expenses of the BA Employees.

c) All payments to BA in terms of clause (a) above shall be made in Indian Rupees only as under: 1. 50% of invoice value within thirty (30) days of submission of invoice 2. Balance payable within thirty (30) days thereafter after proper scrutiny of the invoice submitted by BA

d) BA Employees shall not be entitled to any overtime charges or to work on any holidays as a compensation for the leave taken or absence

from work on any other working days. BA employees shall also not be paid for working on any week ends or holidays declared by WTI or its Clients.

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6.4. In case, on verification of an invoice, it is found that the BA personnel have not worked for the number of hours invoiced, WTI shall be at liberty to adjust the invoice value proportionately.

6.5. BA shall provide to WTI all, documents, data and information about the salary and other benefits provided by it to its Employees as and when called upon to do so by WTI. However in case of BA Employees sent on Overseas deputation, BA shall provide this said information in the prescribed form every month.

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6.7. WTI shall have the right to withhold payment under the following circumstances,

(a) If, upon a request by WTI, BA has not replaced any Employee(s) within a period of fifteen (15) days from such request having been made, which Employee(s) is (are), in the sole discretion of WTI, incapable of performing the functions assigned to him/her/them by the WTI Project Leader and/or is otherwise considered by WTI in its sole discretion to be replaced for whatsoever reason.

(b) If, BA has not replaced the Employee(s) who has become incapable of performing the obligations of BA under the terms of this agreement, such incapability arising due to death, disease, resignation or by whatsoever means, within a period of fifteen days from such incapability. ...” (Emphasis added)”.

7.2 From the above excerpts of the contract, it can be safely concluded that the nature of the contract is for supply of manpower. The consideration is paid on the basis of man-hours. It can also be seen that the work is executed as per the guidance of M/s. WTI. Thus, for carrying out the development, maintenance, etc., of software, the persons so deployed by the appellant to M/s. WTI are under the control of M/s. WTI and they work under the guidance and supervision of M/s. WTI.”

27. The Tribunal relied upon the decision in the case of M/s. *Future Focus Infotech India (P) Ltd. Vs CST Chennai* - 2010 (18) STR 308

(Tri.-Chennai). It is submitted by the Ld. A.R that the appeal filed by the party before the Hon'ble Apex Court against such decision has been dismissed as withdrawn. Following the decision of the Tribunal in the appellant's own case, we hold that the demand is legal and the same is sustained.

28. The third demand is under the category of "Commercial Training or Coaching Services". The appellant has received income from NIIT for imparting computer coaching services. It is not denied that appellant is a franchise of M/s.NIIT for providing such classes. The classes provided may be theory classes or practical training classes. The category of 'Commercial Coaching or Training Services' covers the practical training classes also. We therefore do not find any ground to set aside the demand under this category.

29. The appellant has also argued on the ground of limitation. Only small part of the demand as per the above SCN would fall within the extended period of limitation. The main contention put forward by the Ld. Counsel with regard to MRSS is that said issue being an interpretational one and as there was decision rendered in the case of *Cognizant Tech. Solutions (I) Pvt. Ltd.* – 2010 (18) S.T.R. 326 (Tri.-Chennai) in favour of the assessee, the show cause notice invoking the extended period cannot sustain. It has to be pointed out that Business Associate Agreement entered between the appellant and M/s.WTI clearly shows that the employees are deputed to work for M/s.WTI and its clients and the consideration is

paid on monthly basis. The terms agreed thereupon stipulate that employees deputed to WTI are not eligible for overtime charges. The conditions with regard to number of holidays that can be availed by the employees is also stipulated. When the agreement was so clear, the appellant ought to have discharged service tax under the MRSS. We therefore do not find any ground to hold that SCN is barred by limitation.

30. In the result, the impugned orders are sustained. Appeals are dismissed.

(order pronounced in court on 05.06.2023)

Sd/-
(M. AJIT KUMAR)
MEMBER (TECHNICAL)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

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