

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. II**

**Date of Hearing: 04.06.2018
Date of Pronouncement: 12.06.2018**

Appeal No. ST/476-477/2012 [DB]

[Arising out of Order-in-Original No. 02-AM-CSTADJ-2012 dated 11/01/2012 & OIO-10-GB-2012 dated 17/01/2012 passed by Commissioner of Service Tax-DELHI - I]

TATA CONSULTANCY SERVICES LIMITED

Appellants

Vs.

C.S.T.-DELHI

Respondent

Appearance:

Shri Narender Singhavi, Advocate for the Revenue
Shri Amresh Jain, DR for the Respondent

CORAM:

Hon'ble Mr. V. Padmanabhan, Member (Technical)
Hon'ble Ms. Rachna Gupta, Member (Judicial)

FINAL ORDER NO. 52196-52197/2018

Per V. Padmanabhan:

1. These two appeals filed by the same appellant have overlapping issues for different periods and hence are being disposed off through this common order. The details of the appeals being disposed off are deputed below;

	Show Cause Notice No.4708 dated 04.07.2008 O-I-O No. 2/2012 dated 11/1/2012 Appeal No. ST/476/2012			Show Cause Notice dated 26.02.2010 O-I-O No. 10/2012 dated 19/1/2012 Appeal No. ST/477/2012	
	Description	Period	Service Tax	Period	Service tax
1.	25% amount retained on course fee received from student undergoing Diploma in Advance Software Technology at affiliated centers (Franchise Service).	01/07/2003 to 30/06/2004	2,14,225/-		

2.	Operation and management of computer centers of Department of Science and Technology(Management Consultancy service)	01/04/2003 to 31/03/2006	2,44,99,380 /-	01/04/2006 to 31/03/2007	4,53.022/-
3.	Preparation of call letters, question papers, evaluation etc. for other parties (Manpower recruitment or supply agency service)	01/04/2003 to 31/03/2006	21,07,763/-	01/04/2006 to 31/03/2007	1,41,81,142 /-

2. The appellant is engaged in activities relating to information technology. The disputes can be crystallized into three issues and these are briefly discussed separately below for a proper appreciation of the facts;

2.1 **Franchise Service**

The appellant has developed and is running a course called “Diploma in Advanced Software Technology (DAST). This course is run partially through the appellants own centers and also through certain other centers affiliated to it. The students undergoing these courses at the affiliated centers, pay fee directly to the appellant. Out of the said amount, 75 % is retained by the appellant and the rest paid to the affiliated centre. The Revenue was of the view that for the 25% amount retained by the appellant, the appellant is liable to pay service tax under the category of Franchise Service falling under Section 65(47) of the Finance Act, 1994). For the period 1/07/2003 to 30/06/2004, service tax has been demanded amounting to Rs. 2,14,225.

2.2 **Management Consultancy Service.**

2.2.1 The appellant entered into an agreement with the Department of Science and Technology (National Center of Medium Range Weather Forecasting)(DST). The DST has set up a computing facility with computing systems and peripherals. As per the agreement, the appellant was given the responsibility for Facility Management Services which inclosed;

(I) Computerized data entry and processing at the service centers of customers.

(II) Development of software and facility management in the nature of technology support for running the system.

(III) Technology support for running system without supply of software.

(VI) Providing services of IT professionals.

2.2.2 The activities to be carried out by the appellant included the operation of the systems and management of the centre. The Revenue was of the view that the activities performed by the appellant in terms of the agreement with DST were liable to payment of service tax under category of Management Consultancy Service falling under Section 65(65) read with Section 65(105)(k) of the Act. Service tax demand amounting to Rs. 2,44,99,380 has been confirmed for the period 1/04/2003 to 31/03/2006 and Rs. 4,53,022 for period 1/04/2006 to 31/03/2007.

2.3 Manpower recruitment or supply agency service.

2.3.1 The appellant entered into agreements with M/s Hindustan Aeronautics Limited and M/s Food Corporation of India. Under these agreements, the appellant carried out the activities of application data management, pre-examination and post-examination activities. Such

activities were in the nature of back end activities and supported the manpower recruitment activity of the client by providing Service such as analyses of application forms, data entry, generation of role numbers, printing of admit cards, instructions and answer sheet etc,. and evaluation of answers. Revenue was of the view that such activities were covered within the definition of Manpower Recruitment and Supply Agency Service falling under Section 65(68) read with Section 65 (105)(k). Service tax demand amounting to Rs. 21.07,763 for period 1/04/2003 to 31/03/2006 as well as Rs. 1,14,81,142 for period 1/04/2006 to 31/03/2007 has been confirmed vide the impugned orders.

3. The adjudicating authority has also ordered payment of interest as well as penalties under various sections of the Finance Act, 1994. The above two orders-in-Original have been challenged before us.
4. In this connection, we have heard Shri Narender Singhavi, Ld. Advocate for the appellant as well as Shri. Amresh Jain, Ld. DR representing Revenue.
5. The case argued by the Ld. advocate on behalf of the appellant is summarized below:

(a) Regarding the demand under category of Franchise Service, it was submitted that the issue has been decided against the appellant in appellant's own case decided by the Bangalore Bench of the Tribunal which is reported as CMC limited vs. Commissioner 2011(23)STR(586) (Tribunal Bangalore). He also fairly conceded that the assessee's appeal against the said order was dismissed by the Hon'ble Supreme Court 2016(43) STR J 84(ST). However he submitted that the

entire demand under this category is time barred in as much as the appellant did not suppress any facts and was under the bonafide view that the activities were covered by the exemption Notification No. 9/2003 ST dated 20/06/2003. Even in the decision cited above, the penalty has been waved by taking recourse to Section 80. He submitted that since the whole demand under the category is beyond the normal period of limitation, the demand is liable to be set aside.

(b) The Ld. Advocate took us elaborately through the various clauses of the Facility Management Agreement. He emphasized that from the detailed activities set out in the agreement, it is evident that the appellant was responsible for the operation of the facility/system installed in DST, by employing their own personnel. They opposed the view taken by the Adjudicating Authority that such activities will be covered under the category of Management Consultancy Service. He would make a distinction between the actual management or executor functions and the activities of rendering advice, technical assistance and consultancy. It is this submission that the scope of the agreement entrusts the tasks of operation and management of the computing facilities. Since the appellant is operating/ managing the facilities and does not provide advice etc,. to DST, he argued that the activities will not be covered within the definition of Management Consultancy Service.

(c) He relied on the case of Basti sugar mills vs. Commissioner 2007(STR) 431 (Tribunal Delhi) wherein it was held that a manager is different from a Management Consultant and that

where the agreement confirmed operational autonomy and responsibility, it is not one of Consultancy. This decision has been upheld by the Hon'ble Supreme Court on 2012{25 STR J 154(SC)}. He also relied on the following case laws where similar views have been expressed;

- 1. *Indian Hotels Co Limited v. Commissioner, 2016 (41) STR 913 (Tri-Mum)***
- 2. *Sterlite Optical Technologies Limited v. Commissioner, 2009 (13) STR 582 (Tri-Ahmd), upheld by Hon'ble Gujarat High Court at 2016 (41) STR J305(Guj).***
- 3. *UTI Technology Service Limited v. Commissioner, 2012(26) STR 147(Tri-mum)***

(d) Without prejudice to the above assessee also submitted that the activities were covered under the scope of Information and Technology Services which became taxable from 16/05/2008 and thus cannot be taxed prior to this act. The argument of time has also been raised.

(e) Regarding the demand under Manpower Recruitment or Supply Service, he submitted that the activities undertaken can be categorized as pre/ recruitment activities. Such activities have been included within the definition by insertion of Explanation in Section 65(105) (k) only with effect from 1/06/2007. He submitted that by introduction of the Explanation, the scope of the taxable service has been expanded by including the pre recruitment activities. Such an amendment has to be considered as prospective, since it creates the tax liability on the appellant hence he argued that

the demand prior to 1/06/2007 is not sustainable. In this connection reliance is placed on the following decisions;

- ***Mcdonald's India Private Limited v. Commissioner, 2017 (50) STR 156 (Tri-Del), upheld by Hon'ble High Court at 2018 (8) GSTL 25 (Del)***
- ***Union of India v. Martin Lottery Agencies Limited, 2009 (14) STR 593 (SC)***

6. The Ld. DR opposed the arguments and justified the impugned order. His arguments are summarized bellow;

(a) Regarding the demand raised in the category of Franchise Service, he submitted that the issue on merit is decided against the appellant. He justified the demand for the full period with the argument that the Bangalore Bench in the case of CMC has only waived the penalty hence he appealed the full demand may be upheld.

(b) Regarding the Management Consultancy Service, he took us through the definition of the Management Consultancy Service, existing in different periods. He asserted that the definition was wide enough to include management of an organization but also includes the activities rendered such as advice consultancy or technical assistance. The activities undertaken by the appellant as per the agreement with DST can be considered has falling within the expression "technical assistance" in relation to working system of DST"

(c) The Ld. DR distinguished the cases cited by the appellant-Basti Sugar as well as Indian Hotels limited(Supra). He submitted that

these cases deal with instances of one agency given the complete responsibility of managing another co.

(d) Regarding the Manpower Recruitment Service, he explained that the activities undertaken by the appellant i.e. pre recruitment activities/ are covered by the definition under 65(105) (k) even prior to inclusion of the explanation. Hence it is his submission that demand is justified even for the period prior to 1/06/2007. He also submitted that the decision of the Hon'ble Supreme Court in the case of Martin Lottery Agency is given in a totally different context. In the said case the explanation had the fact of expanding the scope of levy and prior to the explanation, the said activities were not covered by the entry for service tax

7. Heard both sides and perused the appeal records.
8. The first demand has been raised under the category of Franchisee Service. The appellant has developed a course relating to Diploma in Advance Software Technology. Such course has been run through affiliated centers and out of the fee charged from the students, 25 per cent of the fees has been retained by the appellant. Revenue's case is that Service Tax is liable to be paid on the said amount retained, under the category of Franchise Services.
9. The issue has been decided against the assessee in appellant's own case **CMC Ltd. V/s Commissioner Hyderabad (supra)**. In the said case, the Tribunal has upheld the demand under the Franchisee Service but set aside the penalty by taking recourse to Section 80 of the Act. The observations of the Tribunal are reproduced below:-

“12. On the factual matrix on the perusal of the agreement entered by the appellant with one of the franchisees, we find that in clause No. 5, there is a clear cut restriction on the franchisee in the following terms :-

“5. Territory, Audience and General curriculum :

- i. *The Franchisee will not conduct their own technical classes/teaching topics similar to those included in the standard CMC Modular DAST Course covered under this agreement.”*

13. *From the above reproduced Clause No. 5(i) of the agreement, it is very clear that the franchisees are not allowed to conduct their own technical classes/teaching topics similar to those included in the course given by the appellant through the franchisees. In Clause No. 7, the agreement specifically indicates that there has to be periodic reporting and audit in respect of the students who undertook the courses conducted by the appellant. It is also seen from the said clause that the franchisee has to provide an annual business plan which includes marketing and teaching plans of the courses covered under the agreement and that said clause also talks about forecasting the amount of royalty payments expected to be paid to the appellant. We find that Clause No. 11 of the said agreement is of financial considerations to be paid by the franchisee to the appellant which we may reproduce:-*

“11. Financial considerations :-

- i. *The current schedule of charges for conducting CMC Modular DAST Course facilities by the Franchisee is as follows :-*

(a) *The franchisee will pay to CMC a one time Franchise Fee of Rs. 1,44,000/- (Rupees one lakh fourty thousand only) per location for the specific twenty seven months period under this agreement.*

(b) *A royalty worked out at the rate of 25% of course fee of each participant to CMC Modular DAST Courses. Fee for the courses would be determined from time to time by CMC. The current fee schedule applicable for the Modular DAST Courses Semester wise is given in Annexure-II.”*

14. *It can be seen from the above reproduced clauses in the Financial consideration in the agreement that 25% of the fees which has been retained by the appellant on which demand of service tax has arisen is indicated as a royalty. In our view, this royalty would be recurring and of perpetual nature till the agreement is valid. If that be so, the contention of the assessee that they are not satisfying the clause No. 3 of the definition of the franchise service seems to be misconceived, as if an amount is paid periodically, by any other name would be an amount paid in connection with the arrangement as per the agreement entered between the appellant and franchisee. We find that the decision of the co-ordinate Bench in the case of Jetking Information Ltd. (supra) is squarely on the point. We may reproduce the ratio :-*

“6. The taxable service stands defined in Section 65(105)(z) of Service Tax Act, as “any service provided to a Franchisee, by the Franchisor in relation to Franchise”. The Franchisor develops the brand name, concept of following the business, promotes the same and establishes the name. As such, by entertaining into an agreement of Franchisee’s, it assigns the brand name to other person to carry out the business under his brand name or trade name, in the same manner in which he himself was conducting the business. The definitions of Franchisor under Section 65(48) of the Act, means “any person who enters into franchise with an franchisee and includes any associate of franchisor or a person designated by franchisor to enter into franchisee’s on his behalf. The agreement as placed before us refers the appellant as the franchisor and the other party as franchisee. In terms of the said agreement there are obligations on the franchisee to set up the adequate premises and to conduct the business in accordance with the terms of the agreement. For the said franchisee, is under an obligation to pay fixed amount to the appellant and in addition recurring franchisee fee at the rate of 15%. The purpose of the agreement of franchisees is to enable franchisee to carry on the business in the manner desired by the franchisor. The agreement also reveals that the appellant shall provide prospectus, course material, brochure, leaflets, direct mail materials, stationery etc. They shall also provide additional training to the staff franchisee request at additional cost. As such, it is

seen that the agreements between the appellant and their franchisees satisfy all the four requisites of the definition of 'Franchise' as provided under Section 65(47) of the Act, and the appellant is liable to pay service tax on the said services.

7. The appellants have also claimed the benefit of Notification No. 9/03-S.T., dated 20-6-2003, which exempts taxable services provided in relation to commercial training or coaching by a vocational training institute, computer training institute or a recreational training institute, to any persons from the whole of the service tax leviable thereon under Sub-Section (2) of Section 66 of the said Act. Reading of the above notification clearly leads to the conclusion that the exemption provided is in respect of services relating to commercial training or coaching. As rightly held by the Commissioner (Appeals) appellant is providing two different services under two different categories namely - (a) Commercial Training and Coaching Services and (b) Franchise Services. The notification only exempts services provided as commercial training and coaching. The Id. Advocate's argument that the expression "in relation to" appearing in the notification is of wide connotation and would include the franchisees services also, cannot be accepted. Even if the said expression "in relation to" is held to be of wide sphere, the same has to be extended only in relation to the commercial training or coaching being given by the institute. It cannot be extended and stretched to such an extension, so as to hold that any service by training institute would get exempted even though it may be in a different field. Taking hypothetical example that if a training institute is also undertaking advertising service, can it be said that the same would not attract to tax merely because the same is provided by a training institute. The vocational training institute and recreational training institute stands defined in the explanation to the notification and it is the commercial training or coaching by the said institute to any person. (emphasis provided). The services provided by the institute have to be viewed in the light of the definitions of such institute given in the notification. The same cannot be extended to franchise services given by the said institute to the franchisee. As such, we hold that the benefit of the said notification is also not to be available to the appellant."

It can be seen from the above reproduced portion of the decision and order of the co-ordinate Bench that the issue is now covered in favour of the Revenue and against the assessee on merits."

10. The appellant has submitted that they were under the bonafide belief that no Service Tax is liable to be paid under the Franchise Service. But the Adjudicating Authority has recorded that the appellant has failed to disclose the fact that such amounts were being recovered and retained by the appellant and hence he has concluded that the value retained by the appellant has escaped Service Tax. We are of view that the appellant is liable to make payment of Service Tax under the category of Franchise Service for the full period of demand. However, by following the decision of the Bangalore Bench, we set aside the penalties by taking recourse of Section 80 of the Act.
11. The second part the demand of Service Tax has been raised under the category of Management Consultancy Service. The appellant has entered into an agreement with the Department of Science and

Technology (DST). Various activities were required to be carried out by the appellant under this agreement, towards Facility Management Services. The activity included those related to the operations of the computer systems; providing management services; providing technical service; management of computer facility and also providing systems software personnel for installment of software, managing user account, setting up and maintaining the network development of utilities etc. Revenue is of the view that the activities are covered within the definition of Management Consultancy Services. But the appellant has argued that they were responsible for entire operation of the facilities/ system installed in DST through its own personnel. It is their submission that the definition of Management Consultancy Service does not include the actual management or executor functions but only covers rendering of advice, technical assistance and consultancy. They have also relied on various case laws.

12. Let us now examine the statutory definitions provided in respect of 'Management Consultancy Services'. During 16-10-1998 to 30-4-2006, the statutory definition read as follows :

" 'Management Consultant' means any person who is engaged in providing any service, either directly or indirectly, in connection with the management of any organization in any manner and includes any person who renders any advice, consultancy or technical assistance, in relating to conceptualizing, devising, development, modification, rectification or upgradation of any working system of any organization."

The definition underwent a change on 1-5-2006 and during 1-5-2006 to 1-6-2007, the revised definition read as follows :

" 'Management Consultant' means any person who is engaged in providing any service, either directly or indirectly, in connection with the management of any

organisation in any manner and includes any person who renders any advice, consultancy or technical assistance, in relation to financial management, human resources management, marketing management, production management, logistics management, procurement and management of information technology resources or other similar areas of management."

The definition underwent a further change w.e.f. 1-6-2007 and the amended definition read as follows:

" 'Management or business Consultant' means any person who is engaged in providing any service, either directly or indirectly, in connection with the management of any organisation in any manner and includes any person who renders any advice, consultancy or technical assistance, in relation to financial management, human resources management, marketing management, production management, logistics management, procurement and management of information technology resources or other similar areas of management."

Taxable service was defined in Section 65(105)(r) as -

"any service provided or to be provided to a client, by a management consultant in connection with the management of any organization, in any manner".

From the above definition, it can be seen that the definition consists of two parts. The first part says that any service *either directly or indirectly in connection with* the management of any organisation *in any manner* would be a management consultancy service. The expressions used in the definition, namely, 'means' and 'includes', 'either directly or indirectly', 'in connection with the management' and 'in any manner' are expressions of width and amplitude and includes in their scope any service in relation to the management of any organisation. The second part of the definition is the inclusive part which provides for rendering of any advice, consultancy or technical assistance in specific areas of management.

13. It has been vociferously argued on behalf of the appellant that the activities under the agreement involved operation and management of the facilities for DST but did not involve any consultancy. When we carefully consider the definition of Management Consultant as it existed during the different periods, it is evident that the appellant has not carried out management of any complete organization such as the DST. But what has been done is technical assistance in the operation of the computer systems of DST and management of the Centre. Such activities, definitely are liable to be covered within the terms '**Technical Assistance in relation to..... any working system of any organization**', In the definition prevalent during w.e.f. 01/05/2006 to 01/06/2007, the activities performed by the appellant would be even more specifically covered under '**Technical Assistance in relation to..... management of information technology resources**'. In view of above we have no hesitation in holding that the activity performed by the appellant for DST would be covered within the definition of management consultancy services during the period of dispute.

14. The appellant has strenuously relied on the decisions of the Tribunal in the case of ***Basti Sugar Mills*** as well as ***Indian Hotels Company Ltd (supra)***. We have carefully considered the said decisions but we find that in both the above decisions the issue was different from the one before us. In both the above cases the Tribunal had occasion to examine the liability of Service Tax in those cases where the entire management of a company was outsourced to another. It was held in those cases that such activities are not covered by the definition of management consultant. But as discussed above, we are of the view that the activities carried out by the appellant as per

the Facility Management Agreement for DST will fall within the definition of Management Consultancy Services and hence on merit levy of Service Tax is sustainable.

15. The only remaining issue is regarding the levy of Service Tax under the category of 'Manpower Recruitment of Supply Agency Service'. As per the agreement entered into by the appellant with **M/s Hindustan Aeronautics Ltd.** as well as **Food Corporation of India**, the appellant carried out various backend activities such as analysis of application forms, data entries and processing, generation of roll numbers, answer sheets, printing of test paper, printing of OMR sheet etc. It is evident that such activities are in the nature of pre-recruitment work. Revenue was of the view these activities would be covered within the definition of Man Power or Supply Agency Recruitment Service defined under 65 (105) (k). The definition is reproduced below:-

"[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.]

w.e.f. 01.06.2007

[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. The appellant does not deny the fact that the activities are in the nature of pre recruitment work but claims that it will be covered within the definition only after the insertion of the Explanation w.e.f. 01/06/2007. It is their contention that the Explanation has to be read prospectively as it seeks to expand the scope of the levy under this category. But Revenue through the Ld. DR have submitted that the

activities would be covered within the main definition with or without the Explanation.

17. The definition covers service rendered to any person in relation to recruitment or supply of manpower. Evidently, the pre recruitment work provided by the appellant would definitely come within the category of 'service rendered in relation to supply of manpower'. No doubt the Explanation has made this explicit but we are of the view that the activity is covered by the definition even without reading the Explanation retrospectively.

18. The appellant has relied on the Apex Court decision in the case of ***Martin Lottery Agencies Ltd.*** and has argued that the Explanation cannot be said to have retrospective effect. But as discussed above, we are of the view that even without reading the Explanation retrospectively, the service is covered by the definition of manpower recruitment or supply service. Hence this argument merits to be ignored. Consequently, demand is sustained on merit.

19. The demand for the period 01/04/2003 to 31/03/2006 was raised by the Revenue by issue of show cause notice dated 04/07/2008 by invoking the suppression clause. The demand for the subsequent period 01/04/2006 to 31/03/2007 has been made vide show cause notice dated 26/02/2010 which has also been issued by invoking the suppression clause. While we uphold the invoking of suppression clause in the initial show cause notice dated 04/07/2008 for the reasons recorded by the Adjudicating Authority in para 20, we are of the view that the Revenue is precluded from raising the same clause again in the subsequent show cause notice dated 26/02/2010. In this connection the observations of Hon'ble Supreme Court in the case of Nizam Sugar Ltd. 2006 (197) ELT 465 (SC) will be applicable. Hence we set aside the

portion of demand under the category of Management Consultancy Services as well as Manpower Recruitment or Supply Service vide show cause notice dated 26/02/2010, which falls outside the normal time limit in Section 73.

20. In view of the detailed discussions, we uphold the levy of Service Tax along with interest as above. However, we set aside the penalties imposed, by taking recourse of Section 80 since in respect of all the issues interpretation of the provisions is involved.

21. In the result, the appeals are partly allowed.

(Order pronounced in the open court on_12/06/2018_)

(Rachna Gupta)
Member (Judicial)

(V. Padmanabhan)
Member (Technical)

Rekha