

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.**

**Date of Hearing: 05/06/2018
Date of pronouncement: 18/06/2018**

Appeal No. ST/666/2012-DB

(Arising out of Order-in-Original No.53-54-GB-2012 dated 08/02/2012 passed by Commissioner of Service Tax-DELHI - I)

TATA CONSULTANCY SERVICES LIMITED

Appellant

Vs.

C.S.T.-DELHI

Respondent

Appearance

Sh. Narender singhvi. Adv.

for the appellant

Sh. Amresh Jain DR

for the respondent

**CORAM: Hon'ble Mr. V. PADMANABHAN, Member (Technical)
Hon'ble Ms. RACHNA GUPTA, Member (Judicial)**

Final Order No:52251/2018

Per :Mr. V. Padmanabhan

The Appellants are registered with the Central Excise authorities for paying service tax on various types of taxable services. During the course of audit of their books of account, Revenue found that for certain consideration received from Excise and Taxation Technical Service Authority ("ETTSA" for short) of Punjab Government, during the period 1.10.2004 to 31.03.2009, the appellant had not paid any service tax. The Revenue scrutinized the contract entered into by the appellants with ETTSA and formed the view that the consideration received from ETTSA is for services rendered by the appellants classified under the categories of

Business Auxiliary Service and Management Maintenance or Repair Service. In this matter, two show cause notices were issued one dated 9.4.2010 and another dated 4.10.2010. The impugned order adjudicated the said two show cause notices. The details of the demands raised in these SCNs are as follows:

Show Cause Notice 9/4/2010					Show Cause Notice 4/10/10		
S · N o ·	SERVICE	PERIOD	Amount collected as per Department Rs.	ST payable as per Department Rs.	period	Amount collected as per department	ST payable as per department
1	Business Auxiliary Services(Telecommunication (WAN) Service provided to ETTSA)	1.10.200 4 TO 31.3.200 9	16,90, 77,20 7/-	2,00,05 ,770/-	2009-2010	1,73.76,39 6/-	17,89,796 /-
2	Management , Maintenance or Repair Service (Management of Computer Infrastructure of ETTSA)	2006- 2008	6,00,3 3,514/ -	73,88,0 42/-	1.4.2008 to 15.05.2008	28,17,097/-	3,48,193/-
3	Management , Maintenance or repair Services (Software Maintenance services provided by	1.10.200 4 to 31.3.200 7	7,68,9 0,796/ -	85,93,5 75/-			

	the appellant						
4	Short paid	2006-2009		1,85,601			
5	Total			3,61,72,988/-		2,01,93,493/-	21,37,962/-

2. The Department of Excise and Taxation of the State of Punjab started a programme for comprehensive computerization of operations relating to collection of VAT. ETTSA was the implementing Agency of the said Department. ETTSA floated tenders for execution of different aspects of the work and certain work was awarded to the appellant. The work awarded to the appellant covered areas associated with computerization other than application software.

Broadly the following aspects were covered

(a) Supply of;

(i) hardware

(ii) Software

(iii) UPS

(iv) LAN equipment

(v) Printer etc. and doing structured cabling.

(b) Providing WAN connections to 98 sites.

3. The appellant, in turn, sub-contracted the activity of WAN connection of 98 sites to M/s HFCL Satellite Communication Ltd(“HSCL for short”) and they

entered into an agreement dated 29.2.2003 with HSCL. The Department's case is that the activity of procuring the goods required for setting up WAN and procuring the service of HSCL was a service classifiable under Business Auxiliary Service(BAS), as defined under section 65(19)(iv) which reads "Procurement of goods or services which are inputs for the client". Appellant submits that they were not procuring any goods or services for their clients, namely ETTSA but were procuring the goods and services from other parties like HSCL for discharging their own obligations under the contract entered into by them with ETTSA. ETTSA does not deal with HSCL and therefore, it cannot be considered as if they are procuring the services for HSCL for use by ETTSA. Therefore, under the contract entered with ETTSA, the appellants were solely responsible for carrying out the work as per specification and they discharge their obligation under the contract and under no circumstances it can be considered that they were procuring services of HSCL to be used by ETTSA.

4. In respect of second component of demand under the head of "Management, Maintenance and Repair Services,(MMR)" the appellant submits that the main component sought to be taxed under this head is the remuneration for the salary of Help Desk operators and Data Entry Operators employed by them for operation of the infrastructure set up. It is their contention that the said activity will not come within the definition of Management, Maintenance for Repair Service because the entry under Section 65(64) relates to management of properties and doing part of activities that are

done using such infrastructure cannot be considered as maintenance of properties.

5. Third item is relating to maintenance of software. The appellant submits that the demand under this category is on account of maintenance of software done by the appellants prior to 1.6.07. It is their contention that prior to 1st June, 2007, maintenance of software could not be classified as maintenance of any “goods”. He points out that an Explanation was added in Section 65(64) of Finance Act 1994 defining such services. The said Explanation reads as under:

“Explanation: For the removal or doubts, it is hereby declared that the purpose of this clause,

(a) “goods” includes computer software;

(b) “Properties” includes information technology software”.

6. The appellant submits that the above Explanation imposes additional tax liability contrary to the position clarified by the CBEC in its clarification issued prior to that date. So the contention is that this Explanation cannot have retrospective effect. In this matter, the appellant relies on the decision of Hon’ble Supreme Court in the case of UOI vs. Martine Lottery Agency Ltd reported in 2009 (14) STR 593 (SC).

7. The appellants are also relying on the decision of the Tribunal in the case of SAP India Ltd 2011 (21) STR 303 (Tri-Bangl) holding that prior to 1.6.2007

maintenance or repair of IT software could not be brought under the service defined in Section 65(64) of Finance Act, 1994.

8. The Ld. Counsel for the appellant further argued that the Revenue has demanded service tax under BAS, in respect of the outsourced WAN contract. The rest of the contract with ETTSA has been lumped together for levy of service tax under MMR Service. He opposed such view Section of the contract and contended that the whole agreement should be considered as a works contract which is not liable for service tax prior to 1/06/2007. Alternatively, he submitted that no service tax is chargeable under BAS since the appellant had rendered the service to ETTSA whose activity is not “business” in this connection he relied on various case laws.

9. The Ld. Advocate opposed to the classification of service (other than WAN) under MMR. He submitted that the activity carried out was in the nature of Information Technology Software Service which was brought into the statute only with effect from 16/05/2008 and the same activity cannot be levied to tax under MMR service for period prior to that.

10. The Ld. DR vehemently justified the impugned order. He argued that the agreement entered into by the appellant with ETTSA was no doubt a composite contract. But he argued that all composite contracts are not liable for classification under WCS. He submitted that in the contract in question, the goods are not sold to the client in the course of rendering the services and hence, the same does not fall under WCS. Under the said contract, different

parts deal with supplier of goods and services. And hence the same can be vivi sector and charged to service tax under different heads. He further argued that the portion of WAN contract which has been given to HSCL is classifiable under BAS since, the appellant has procured such services from HSCL on back-to-back basis for supply to ETTSA. Since, the appellant has been charging mark-up in the transaction, while filing to ETTSA, the Department was justified in charging service tax on such mark up.

11. Heard both sides and perused the record.

12.The disputes are as follows:-

- i. Levy of Service Tax under the category of Businesses Auxiliary Services, which was out sourced by the appellant to HSCL for implementation of Wide Area Network (WAN) for ETTSA.
- ii. Demand of Service Tax under the category of Management, Maintenance and Repair Services for the activities carried out by the appellant for ETTSA.
- iii. Demand of Service Tax under the category of MMR for maintenance of software.

13. First we take up the issue of demand of Service Tax under the category of Business Auxiliary Service. The definition of BAS is reproduced below;

Section 65(19) 'Business Auxiliary Service' means any service in relation to:-

- (i) Promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) Promotion or marketing of service provided by the client; or

(iii) **Procurement of goods or services, which are inputs for the client or**

(iv) Production or processing of goods for, or on behalf of the client; or

(v) Provision of service on behalf of the client; or

(vi) A service incidental or auxiliary to any activity specified in sub-clause (I) to

(VI) such as billing, issue or collection or recovery of cheques, payments, maintenance of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, but does not include any information technology services and any their activity that amounts to “manufacture” within the meaning or clause (f) of Section 2 of the Central Excise Act, 1944.

Explanation:- For removal or doubts, it is hereby declared that for the purpose of this clause, “Information technology service” means any service in relation to designing developing or maintaining of computer software, or computerization, data processing or system networking or any other service primarily in relation to operation of computer system;”

w.e.f. 16/06/2005, the following Explanation was added to the sub-clause (vi) of the Section 65(19)

“Explanation-For removal or doubts, it is hereby declared that for the purposes of this Section 65(105) (zzb)

Taxable service' means any service provided or to be provided to a client by any person in relation to Business Auxiliary Service"

14. Revenue is of the view that the activities carried out in terms of the agreement with ETTSA, but out sourced to M/s HSCL is covered by the sub category 'Procurement of Goods or Services which are inputs for the client'. As per the agreement with ETTSA, the appellant has been entrusted with the work of computerization of the Sales Tax System and operation of the same. A part of this work pertaining to setting up of the WAN connection has been sub-contracted to HSCL. The agreement with HSCL is to provide. Establish and operate Wide Area Network (WAN) using a mix of Land Optical Fibre Network and VSAT based network to provide the connectivity as a whole with required equipment, and bandwidth as per the agreement between CMC and ETTSA.

15. The nature of the above activity is evidently in the form of system networking, since it involves interconnection of the computer systems working in 98 different sites by set up of Wide Area Network. The Explanation which is appended at the end of the definition in Section 65 (19) for BAS explains what constitutes 'Information Technology Service'. One of the activities subsumed within the IT service is the activity of "system networking". Hence leads us to conclude that the activity out sourced to HSCL was in the nature of Information Technology Service. The definition of BAS has excluded Information Technology Services, through the above Explanation. Consequently, we are led to the conclusion that even if the appellant has procured the service of establishing WAN through the outsourced service provider HSCL, the activity will not be covered within the definition of BAS.

16. Another argument advanced by the appellant in resisting the levy under BAS is that the service procured by them for ETTSA through HSCL is not in connection with any business of the client who is an arm of the Government of Punjab. Thus in the present case the service rendered by the appellant has been rendered to a Government Department which are not engaged in business but in rendering public services. Hence the procurement of service for ETTSA cannot be brought within the levy of service tax under BAS. This view finds support in the very many case laws cited by the appellant. In the result we conclude that the levy of service tax on the activity of setting up of WAN, which has been outsourced to HSCL is not justifiable and hence, the demand is set aside.

17. Next we deal with the levy of service tax under the category of MMR. Under the above category, services tax has been demanded on all activities carried out for ETTSA (other than WAN). In addition, in respect of various other contracts in which maintenance of software has been undertaken by the appellant have also been brought under the same category. The definitions of MMR service are produced below for ready reference;

Section 65(64) "Management, Maintenance of Repair Service" means any service provided by-

- (i) any person under a contract or an agreement: or
- (ii) a manufacturer or any person authorized by him, in relation to-
 - (a) management of properties, whether immovable or not;
 - (b) maintenance or repair of properties, whether immovable or not; or

(c) maintenance or repair including reconditioning or restoration, or servicing of any goods, excluding a motor vehicle.

Explanation—For the removal of doubts, it is hereby declared that for the purpose of this clause,-

(a) “goods” includes computer software;

(b) “properties” includes information technology software”

18. From the above definition it is evident that the service has to be in connection with management or repair of property/immovable or movable. With effect from 16/05/2008, an Explanation also has been inserted to deem computer software as “goods” and also Information Technology Software as “properties”

19. The activities which the appellant was required to carry out to for ETTSA included supply of hardware, software, UPS, LAN equipment and also paying the structural cabling and setting up of the WAN network. The contention of the appellant is that the agreement was for establishing and operating the computerization for collection of VAT. These activities are not merely for management of facilities but require operation of the centres. The maintenance, if at all carried out by the appellant, was done as part of the operation of the computer systems. Hence we are of the view that such activities will not fall within the Management Maintenance or Repair Service. It appears to us that the activities outlined in the contract would more appropriately be covered within the definition of “Business Support Services” which were included with effect from 1/05/2011, under Section [65/105(104(c))]. Since, the

activities are not covered a category of MMR, we set aside the levy of service tax under the said category.

20. The lower authority has also upheld the demand for service tax under MMR in respect of maintenance of software. Such demand has been made for the period October, 2004 to March, 2007. Revenue has interpreted that the Explanation inserted in the definition for MMR, (with effect from 16/05/2008) is to be read retrospectively. The Explanation has deemed computer software to be "goods" and information technology software to be within the term "properties". The appellant has strenuously contended that such an interpretation is misplaced. They have relied on the Hon'ble Supreme Court's decision in the case of Martin Lottery (supra).

21. We have carefully considered the Explanation in question. The wording of the Explanation starts with the words and expressions, "for the removal of doubts----", but it will not be appropriate to consider the same to have retrospective effect since it has the effect of expanding the scope of the levy of service tax. This view is, following the ratio of the Apex Court's decision in the Martin Lottery case (supra). Hence for the period under dispute, it cannot be presumed that the maintenance or software service is covered under the category of MMR. Consequently the demand of service tax on maintenance of software, under the category of MMR is not justified and hence set aside.

22. There is a demand amounting to Rs 1,85,601 which has arisen as a result of certain calculation errors on the part of the appellant. But since, we have set aside the entire demand in both the Show Cause Notices, this demand automatically becomes infructuous.

23. In the light of the discussion the impugned order is set aside and appeal is allowed.

(Pronounced in open court on 18/06/2018)

(RACHNA GUPTA)
Member (Judicial)

(V. PADMANABHAN)
Member (Technical)

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