

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

Appeal No. ST/197/2009

Arising out of Order-in-Appeal No. 35/ST/B-I/2009 dated 30.03.2009 passed by the Commissioner of Central Excise, Customs & S. Tax (Appeals), BBSR-I.

M/s Infosys Technologies Ltd.

....Appellant (s)

Vs.

Commissioner of Central Excise, Customs & S. Tax, BBSR-I

...Respondent (s)

Appearance:

Shri R. Dakshina Murthy, Advocate for the Appellant (s)

Shri D. Haldar, A. C. (AR) for the Respondent(s)

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing/Decision: - 04.12.2018

Order No...FO/A/77326/2018

Per Shri P. K. Choudhary:

The present appeal has been filed by the assessee, namely, M/s. Infosys Technologies Limited, against the demand of service tax of Rs.3,79,428/- with equivalent penalty and applicable interest, for the period from 16.08.2002 to 31.01.2007 confirmed by the Ld. Assistant Commissioner vide Order-in-Original dated 30.06.2008 under the category of 'Health Club and Fitness Centre services', which has been further upheld by the Ld. Commissioner (Appeals), Bhubaneswar, vide Order-in-Appeal dated 30.03.2009. The assessee is in appeal before us against the aforesaid appellate order.

2. Briefly stated, the facts of the case are that the appellant is engaged in the business of development of software as a 100% EOU operating under the STPI scheme. The appellant has settled a Trust, namely, 'Infosys Technologies Limited Employees Welfare Trust' (hereinafter referred to as the 'Trust'), through the Trust Deed dated 15.09.1994 for the purpose of welfare of its employees. The objective of the Trust, inter-alia, includes providing sports and recreational facilities, etc. to the employees of the appellant company who become the members of the Trust on payment of nominal monthly charges. Proceedings were initiated and Show Cause Notice dated 15.03.2007 (SCN) was issued against the appellant company with the allegation that it has rendered services in the category of 'Health Club and Fitness Centre services' to its employees. The appellant contested the said Show Cause Notice primarily on the ground that they had not rendered the services as alleged, but the Trust which is a separate legal entity, having separate Permanent Account Number (PAN) allotted by the Income Tax Department and they are being assessed separately under the Income Tax Act. They also submitted that the demand, if at all, could be raised on the Trust which has actually collected the contribution from the employees and not the appellant company. The demand was also contested on time bar in absence of any evidence of wilful suppression. The Ld. Assistant Commissioner however confirmed the demand as proposed in the Show Cause Notice. In appeal before the Commissioner (Appeals), the appellant submitted that the Trust had separately obtained service tax registration and was discharging service tax from the year 2006 under the category of 'Club

or Association Services' on the amount of contribution received from the members, who are employees of the appellant company. In the appeal proceedings before the Commissioner (Appeals), the appellant also pointed to the subsequent Order-in-Original dated 28.11.2008 (para nos. 3.2 to 3.7 appearing in page nos.47 to 49 of Appeal Paper Book) issued to the appellant for the subsequent period, wherein after noting the fact that since the Trust has already discharged the liability of service tax under Club or Association Services, a parallel demand on appellant company could not be made. The Ld. Assistant Commissioner while dropping the demand against the appellant also accepted that it would be proper to classify the services under 'Club or Association Services' and not under the category 'Health Club & Fitness Centre services'. In the impugned Order-in-Appeal, the Ld. Commissioner (Appeals) after taking note of the above subsequent adjudication order, observed that arguments of appellant could have been accepted had the Trust on the very first occasion come forward and discharged the tax liability.

3. Ld. Advocate, Shri R. Dakshina Murthy, appearing for the appellant submitted that the impugned demand of service tax has been illegally raised on the appellant which is a company whereas the fact being that the subject services, if at all taxable, have been rendered by the Trust constituted way back in 1994 which is separately assessed to Income Tax Act and Service tax, albeit from the subsequent period. The Ld. Advocate also emphasised that the Department having accepted that subject service is properly classifiable under "Club or Association Services", service tax demand cannot be raised on the

same service under the category of "Health Club & Fitness Centre services". In any case, the appellant is not a service provider from whom the demand could be raised. The Ld. Advocate also contested the imposition of penalty and invocation of extended period of limitation in absence of any fraud or wilful suppression.

4. Ld. Departmental Representative, Shri D. Halder A.C., however supported the demand order and submitted that since the Trust did not pay the service tax for the period in dispute impugned herein, but only for the subsequent period, the demand has rightly been assessed on the appellant. He accordingly prayed that the appeal be dismissed.

5. After hearing both sides and on perusal of the appeal records, we find that the Trust has been constituted for the welfare of the employees in 1994 much before the period of dispute impugned herein. Both Trust and the appellant company cannot be said to be one and the same entity, inasmuch as both are separately assessed to Income Tax and both have been granted separate service tax registrations which is a fact on record. Both the authorities below have taken note of the fact that subject service (for gym, health centre, etc) has actually been rendered by the Trust and it is only the premises where gym is located, belongs to the company, which in our view should not be the mere criterion for ascertaining the service provider. In fact, the entire contribution made by the members, on which the instant demand has been raised, has been received by the Trust and not the Company. We also find that in the Show Cause Notice, the quantification of service tax demand is based on the members'

contribution to the Trust, as appearing in the financial statement of the Trust and not the Company.

6. We also observe that as per Section 65(7) of the Finance Act, 1994, the term 'assessee' has been defined to mean the person liable to service tax and includes its agent. As per the Rules, the person liable to pay service tax is the person who has provided the taxable services, i.e. the service provider. It is not disputed that the service has actually been provided by the Trust, who subsequently got registered with the department and started discharging service tax liability which fact has been noted by the Ld. Asst Commissioner in his order dated 28.11.2008, based on which the demand on appellant company has been dropped. In our view, the Lower Appellate Authority committed a fundamental error when he chose to uphold demand on the appellant company merely because the tax was not paid by the Trust, completely ignoring the statutory provisions that under the scheme of the Act, tax could be levied and collected from the person who has actually provided the taxable service. It would be highly injudicious and against the statutory provisions to saddle the appellant with the service tax liability on the services not rendered by them.

7. In view of the above factual matrix and referred statutory provisions, we set aside the demand of service tax, interest and penalty by allowing the instant appeal with consequential relief.

(Dictated and pronounced in the open court.)

(V. PADMANABHAN)
MEMBER (TECHNICAL)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

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