CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
WEST ZONAL BENCH
COURT No.

Appeal No. ST/87313/2015

(Arising out of Order-in-Original No. 14/PR.COMMR(WLH)/LTU-M/S.TAX/2015 dated 31.07.2015 passed by Principal Commissioner of Central Excise & Service Tax (LTU), Mumbai)

Tata Consultancy Services Ltd. **Appellant**
9th floor, Nirmal Building,
Nariman Point,
Mumbai 400 021

Vs.

Commissioner of Central Excise & ST (LTU), Mumbai **Respondent**
8th floor, Centre-I World Trade Centre,
Cuffe Parade, Mumbai 400 005.

WITH

Appeal No. ST/87572/2015

(Arising out of Order-in-Original No. 14/PR.COMMR(WLH)/LTU-M/S.TAX/2015 dated 31.07.2015 passed by Principal Commissioner of Central Excise & Service Tax (LTU), Mumbai)

Commissioner of Central Excise & ST (LTU), Mumbai **Appellant**
8th floor, Centre-I World Trade Centre,
Cuffe Parade, Mumbai 400 005.

Vs.

Tata Consultancy Services Ltd. **Respondent**
9th floor, Nirmal Building,
Nariman Point,
Mumbai 400 021

Appearance:

Shri Prasad Paranjape, Advocate for the Appellant/Assessee
Shri M.K. Sarangi, Authorised Representative for the Respondent/Revenue

CORAM:

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)
Hon'ble Dr. Suvendu Kumar Pati, Member (Judicial)

FINAL ORDER NO. A/**85956-85957/2019**

Date of Hearing: 18.03.2019
Date of Decision: 18.03.2019

PER: SANJIV SRIVASTAVA

These appeals are directed against order in original No 14/PR. COMMR (WLH)/LTU-M/S.TAX/2015 DATED 31.07.2015 of Commissioner Central Excise & Service Tax (LTU) Mumbai. The details of appeals filed are as under:

Appeal No	Appellant	Amount ‘Rs
ST/87313/15-MUM	Tata Consultancy Service (Appellant)	6,29,93,596
ST/87572/15-MUM	Commissioner (LTU) Mumbai	3,31,69,270

1.2 By the said order Commissioner has held as follows:

“5.01 The demand of Service Tax of Rs 6,86,513/- Rs 93,36846/- (i.e. Rs 44,97,598/- + Rs 48,33,248/-) & Rs 17,48,364 is confirmed respectively on the Management Consultancy Services, Franchisee Services and Commercial Training and Coaching Services. The same i.e. Rs 1,17,65,723/- (Rupees One Crore Seventeen Lakhs Sixty Five Thousand Seven Hundred and Twenty Three only) is ordered to be recovered along with interest at appropriate rate under Section 75 of the Finance Act, 1994.

5.02 Penalty of Rs 1,17,65,723/- (Rupees One Crore Seventeen Lakhs Sixty Five Thousand Seven Hundred and Twenty Three only)is imposed on the noticee under Section 78 of the Finance Act, 1994.

5.03 Proceedings demanding service tax on other services dropped.

5.04 CENVAT Credit of Rs 5,12,27,873/- (Rupees Five Crore Twelve Lakhs Twenty Seven Thousand Eight Hundred and Seventy Three only) disallowed and ordered to be recovered under rule 14 of CENVAT Credit Rules, 2004 read with Section 73 of the Finance Act, 1994 along with interest at appropriate rates under Rule 14 ibid, read with Section 75 of the Finance Act, 1994.

5.05 Penalty of Rs 5,12,27,873/- (Rupees Five Crore Twelve Lakhs Twenty Seven Thousand Eight Hundred and Seventy Three only) imposed on the noticee under Rule 15(3) of the CENVAT Credit Rules, 2004 read with section 78 of the Finance Act, 1994."

2.1 A show cause notice dated 4.11.2009 has been issued to the appellant demanding service taxes in respect of various services provided by them and described as in table 1 below. Show cause notice also proposed to deny CENVAT Credit availed by the appellant, without production of the relevant documents evidencing payment of taxes/ duty as required under Rule 9 of CENVAT Credit Rules, 2004. Show Cause Notice had also demanded interest in respect of the demands made and also proposed imposition of penalty under Section 78 of Finance Act, 1994.

Taxable Service	Period	Amount in Rs
Maintenance and Repair	04/05- 12/06	2,56,48,847
Manpower Recruitment		75,20,423
Commercial Coaching & Training		17,48,364
Consulting Engineer/ Technical Consultancy		3,48,376
Franchisee Services		44,97,598
Erection Commissioning & Installation		2,17,71,007
Management Consultancy Service		6,86,513
Mandap Keeper		1,59,261
Business Support		48,33,248
Total		6,72,13,637
CENVAT Credit Sought to be disallowed	4/05 to 03/07	7,35,75,692

2.2 After considering the submissions made by the appellant, Commissioner has adjudicated the show cause notice as per order referred in para 1.2, supra.

2.3 Aggrieved by the order of Commissioner, appellants have filed this appeal.

2.4 Aggrieved by the order of Commissioner, dropping the demand in respect of Maintenance and Repair Service and Manpower Recruitment Services Revenue has filed this appeal.

3.1 We have heard Shri Prasad Paranjape, Advocate for the Appellant and Shri M K Sarangi, Additional Commissioner, Authorized Representative for the Revenue.

3.2 Arguing for the appellant's learned Counsel submitted-

i. That they are licensed as certifying authority by the Controller of Certifying Authorities under the Information Technology Act, 2000 (IT Act). The process of certifying DSC involves receiving application from applicants, sending confirmation codes to the applicants after receiving properly completed verified request from the applicants, verifying the applications and after successful verification of request they generate a DSC. For this purpose they appoint registration authorities which carry out these activities for a fee. These registering authorities are not authorized and do not issue any DSC. The agreement with these registering authorities clearly state that they shall not adopt any trade mark, service mark, trade name or logo i.e. similar to any trade mark, service mark, trade name or logo of the appellant's. The agreement also provides that these registering authorities are not agents, employees or joint venture of appellant and they have no authority to bind the appellant for contractual liability. The registration Authorities collect the DSC Fee from the applicants to be remitted to the appellant when they would raise periodical invoices on the registering authorities for receiving these DSC Fee collected from the applicants. Though the Show Cause Notice demands service tax under the category of Franchisee Service for period from 01.04.2005 to 30.04.2006 and from 01.05.2006 onwards under the category of Business Support Services, the entire demand has been confirmed under the category of Franchisee Service. These services do not qualify as Franchisee Service as has been held in case of-

i. Sify Technologies Ltd [2018 (14) GSTL 268 (T-Chennai)]
ii. Global Transgene Ltd [2013 (32) STR 86 (T-Mum)]
iii. Direct Internet Solutions P Ltd [2014 (36) STR 849 (T-MUM)]
iv. Delhi International Airport P Ltd [2017 (50) STR 275 (Del)]
v. Franch Express Network 9P) Ltd [2008 (12) STR 370 (T-Chennai)]

ii. Commissioner has in his order in para (vi) para 22 held that prior to 16.06.2005 the services are not covered under the category of franchise services hence confirming the demand for that period under that taxable category is erroneous. Further for period 01.05.2006 demand has been made under category of Business Support Services hence confirming the demand under the category of Franchise Service is going beyond the Show Cause Notice and is erroneous and not sustainable as held in following cases-

i. Mahakosal Beverages Pvt Ltd. [2014 (330 STR 616 (Kar)]
ii. Balaji Contractor [2017 (52) STR 259 (T-Del)]
iii. Caprihans India Ltd [2015 (325) ELT 632 (SC)]

iii. Of Smart Card Migration project for Honeywell Automation India Ltd service tax has been demanded under the category of Management consultancy Service, which is not sustainable in view of the decisions in case of-

i. Hewlett Packard India Sales P Ltd [2015 (38) STR 663 (T-Bang)]
ii. Basti Sugar Mills Co Ltd [2007 (7) STR 431 (T-Del)]
iii. Valia Consultancy {2015 (38) STR 1175 (T-Mum)].

iv The Appellants are providing training to their clients/ customers in respect of the software developed by them. They do not provide any training services with respect to any off the shelf software. The training provided by them is part and parcel of the software development contract with the customers. They have not provided any service in nature of “Commercial Coaching and Training”. The training provided by them is only incidental to the software development undertaken by them. Hence demand in respect of this cannot be sustained. Relied on the decisions in case of Punjab Communication Ltd [2012 (25) STR 89 T-Del)] and Bentley Systems (I) Pvt Ltd. [2017-TIOL-3714-CESTAT-DEL)].

v. They have all the documents against which they have taken the CENVAT Credit. They had produced some of these documents before the Commissioner and had requested for some more time for production of the remaining documents. However Commissioner proceeded to disallow the credit relying on certain report made by range officer to the Assistant Commissioner, copy of which was never given to them. All the documents against which they have taken the credit can be produced before the Tribunal or before the adjudicating authority for consideration if the matter is remanded back to him.

vi. All the services with respect to information technology software including maintenance thereof was brought under tax, by introduction Information Technology

Software Services with effect from 16.05.2008. {Reliance on SAP India Pvt Ltd [2011 (21) STR 303 (T-Bang)], Persistent Systems Ltd. [2016 (42) STR 890 (T-Mum)], Larsen & Tuobro Limited [2017 (4) GSTL 271 9T-Mum)]}

vii. Even the explanation appended to the definition of Management Maintenance and Repair Service definition clause w.e.f 01.06.2007 cannot have retrospective effect as this being substantial expansion to create a levy of tax on software maintenance, it cannot be applied retrospectively. Reliance on {Martin Lottery Agencies Ltd [2009 (14) STR 593 (SC)], Kasturi & Sons Ltd [2011 (22) STR 129 (Mad)], Financial Software Systems Pvt Ltd [2014 (3) STR 393 (T-Chennai)], Phoenix IT Solutions Ltd [(22) STR 400 (T-Bang)], NCR Corporation India Pvt Ltd [2008-TIOL-1322-CESTAT-BANG], India Switch Co Pvt Ltd [2015 (39) STR 288 (T-Chennai)]. Further by stating, *"For removal of doubts"* in the explanation inserted w.e.f 01.06.2007, it is admitted that there existed a doubt in the minds of taxpayers and hence extended period of limitation cannot be invoked.

viii. Appellants do not provide "Manpower Recruitment or Supply Service" but were providing software development services and raised invoices based on time incurred by its employees. These contracts are called time and material contracts wherein the deliverable is in form of software, and the consideration is on the basis of time spent by its employees. Thus Commissioner has rightly held that these services are not covered under Taxable category of Manpower Recruitment or Supply Services. {reliance on 2012 (25) STR 89 T-Del)] and Bentley Systems (I) Pvt Ltd. [2017-TIOL-3714-CESTAT-DEL)]}

3.3 Arguing for the revenue learned Authorized Representative while reiterating the reasons elaborated by the Commissioner while confirming the demands and also the submissions made in revenue appeal submitted-

i. That adjudicating authority has dropped the demand in respect of management maintenance and repair services holding the same to be time barred. He has held so relying on the letter dated 14.06.2005, whereby Board has clarified to them that no service tax was leviable on AMC for software. Explanation was added w.e.f 01.06.2007 declaring by way of removal of doubt stating that "goods" include software. The software has been held to be goods by Apex Court in case of Tata Consultancy Services [2004 (178) ELT 22 (SC)]. Board has also by their letter dated 7.10.2005 and 7.03.2006 clarified that service tax is leviable on maintenance and repair of software with effect from 9.07.2004. Appellant did not pay the service tax even after the clarification issued on 7.10.2005. The letter relied upon by the Commissioner was issued to Chennai unit whereas the demand is in respect of Hyderabad unit. Appellants had also not declared about provision of this service in their ST-3 return. Thus relying on decisions in case of Bajaj Auto [2010 (260) ELT 17 (SC)], Choudhary International Pvt Ltd [2015 (39) STR 170 (T-MUM)], Lakhan Singh [2016 (46) STR 297 (T-Del)] and Vodafone Digilink Ltd [2013 (29) STR 229 (Raj)] he requested that order of Commissioner to this extent be set aside.

ii. In respect of order of Commissioner dropping the demand in respect of Manpower Recruitment an Supply Agency, he submitted in same set of facts in case of Future Focus Infotech Pvt Ltd [2010 (18) STR 308 (T-Chennai)], Focus Infotech Pvt Ltd [2018 (18) STR 441 (T-Chennai)] & Six Sigma Soft Solution [2018 (18) GSTL 448 (T-Mad)]. Since the issue has been settled in favour of revenue by the said decisions the order of Commissioner dropping the demand cannot be sustained.

4.1 We have considered the impugned order along with the appeals filed by both appellant and revenue and the submissions made during the course of argument and in written submissions filed.

4.2 Issues for consideration can be grouped in two categories as follows:

I. Demand of Service Tax on services provided by the appellants in category of-

i. Franchisee Service;
ii. Management Consultancy Services;
iii. Commercial Coaching and Training Services;
iv. Management Maintenance & Repair Service; &
v. Manpower Recruitment or Supply Services.

II Demand of CENVAT Credit disallowed for non production of documents.

4.3 **Demand of Service Tax on services provided by the appellants in category of-**

4.3.1 Franchisee Service-

a. As per the order of Commissioner demand under this category has been confirmed for the period from 04/2005 to 12/2006. While confirming the demand under this category Commissioner has considered demand made under two categories as per the show cause notice Annexure 1 and confirmed the same under the category of Franchisee Services. The two demands as per the Show Cause Notice are as listed below:

Service	4/05 to 9/05		10/05 to 12/06		Total 'Rs
	Service Tax	Cess	Service Tax	Cess	
Franchisee Service	2787272	50895	1626893	32538	4497598
Business Support	0	0	4738478	94770	4833248
Total	2787272	50895	6365371	127308	9330846

b. From the above table it is quite evident that demands have been made under the category of Franchisee Service for the period from 4/05 to 12/06 and for the period from 10/05 to 12/06 demand is in category of Business Support Services. While confirming the demand the commissioner has confirmed both the demands under category of Franchisee Services. As per Section 65 (47) w.e.f 16/06/2005, franchise has been defined as follows:

“"franchise" means an agreement by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved;';”

c. Commissioner has in his order discussed the activity sought to be taxed in this category by observing as follows:

“ii. The noticee is licensed by Controller of Certifying Authority (CCA), New Delhi as a certifying authority for issuance of Digital Signature Certificates. Further, TCS appointed Sub Certifying authorities and Sub CA Administrators (Sub CAA), Registering Authorities and RA-Administration. The impugned notice seeks to levy service tax on this activity under the following categories viz.

-Franchise Service w.e.f 01.04.2004

-Business Support Services w.e.f 01.05.2005

....

iv. On examination of each clause of the definition of “franchise” it is found that the agreement between the noticee and Sub Certifying authorities and Sub CA Administrators (Sub CAA), Registering Authorities and RA-Administration shows that latter were indeed granted representational right to provide the certifications. ***They interacted with the customers clearly representing that certification would be by TCS.*** *However, they were not “agents” of the noticee and were not working for any commission. Instead they were paying fees to TCS in* *return of the right granted to them. Thus the first clause of the definition is satisfied.*

v. *However, there is nothing on record to show that TCS provided the concepts of business operation to the service receivers. There is nothing to show that they provided any know how, method of operation, managerial expertise, marketing technique or training or standards of quality control to them. Thus, the agreement doesn't pass test of second clause.*

vi. *It has been rightly noted in the show cause notice that in order to be recognized as a 'franchise' for the period prior to 16/06/2005, the agreement must fulfill all the four conditions. Since the agreement doesn't meet terms of second clause, it cannot be termed as Franchise. Consequently the, the demand for the period upto 15.06.2005 is dropped.*

vii. *For the period from 16/06/2005 onwards, the clause (ii) to (iv) were absent in the definition and only the first clause was retained. It has already been noted above that the agreement completely meets requirement of first clause. Therefore, the agreement did amount to a franchise for the period from 16/06/2005"*

d. The findings recorded by the Commissioner clearly show that he has not been able to appreciate as to what is meant by *"grant of representational right".* Grant of representational right would imply that the person to whom such rights have been granted under takes the entire activity as if it had been undertaken by the person granting such right. In this case the so called *Sub Certifying authorities and Sub CA Administrators (Sub CAA), Registering Authorities and RA-Administration* appointed by appellants have any authority to issue DSC certificates, representing them to be issued by appellant. Such transfer of right granted to appellant, by the certifying authority in terms of IT Act, 2000, is also not permissible. It is only the Appellants who could have issued the Digital Signature Certificate and this could not have been done by any other person or agency appointed by appellant. Hence mere act of collecting the applications and verification of the same for onward submission to the appellant cannot be termed as "grant of representational rights". We are supported in our view by the decision of Hon'ble Delhi High Court in case of Delhi International Airport P Ltd [2017 (50) STR 275 (DEL)] wherein it has been laid down:

*"**56.** Merely because, by an agreement, a right is conferred on a party to sell or manufacture goods or provide services or undertake a process, would not ipso facto bring the agreement within the ambit of a franchise. What is also required is to establish that the right conferred is a "representational right".*

***57.** The term "representational right" would necessarily qualify all the three possibilities i.e., (i) to sell or manufacture goods, (ii) to provide service, and (iii) undertake any process identified with the franchisor.*

***58.** A representational right would mean that a right is available with the franchisee to represent the franchisor. When the Franchisee represents the franchisor, for all practical purposes, the franchisee loses its individual identity and would be known by the identity of the franchisor. The individual identity of the franchisee is subsumed in the identity of the franchisor. In the case of a franchise, anyone dealing with the franchisee would get an impression as if he were dealing with the franchisor."*

e. Similarly in case of Global Transgene Ltd [2013 (32) TR 86 (T-Mumbai)] Tribunal has held as follows:

***"5.2** From the above, it will follow that before the amendment w.e.f. 16-5-2005 and thereafter the foremost, and key pre-requisite to qualify as taxable service is that the franchisee should have been granted representational right to sell or manufacture goods or to provide service or* *undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved. Board, vide Circular No. 5918/2003-S.T. and Circular No. B1/6/2005-TRU, has recognized this aspect.*

5.3 *Undisputedly, the appellants have imported the Technology which is owned by BTC and patented in China. The said technology is imported in the form of the mother seeds and the same are multiplied in the laboratory by or on behalf of the appellants and given to the sub-licencee to further multiply for onward sale by them to the farmers for the purpose of growing commercial crop. The appellants are not granted any 'representational right' from BTC to represent them in India, nor entitled to grant or they have actually granted any representational right to the sub-licensees.*

5.4 *The Revenue's case rests on the premise that the logo or hallmark belonging to the appellant is put on the seed package manufactured/marketed by the sub-licensees. The appellants produced a few samples of the product package labels before us. On perusal of the samples, we agree with the appellant that the packages contain a mark "Fusion BT" which only denotes that the seeds being sold contain Fusion BT genes, and it does not denote that the said mark is either a logo or a trademark or hallmark of the appellant. The department could not show that any logo or hallmark belonging to the appellant has been put on the packages manufactured/marketed by the sub-licensees. We further find force in the contention of the appellant that a laptop containing a label of 'windows', only denotes that the processor or the operating system/software, as the case may be in the said laptop and by putting such label, the laptop manufacturing company does not represent 'Microsoft' or become the franchisee of 'Microsoft'. Admittedly, in a franchisee* *transaction the franchisee loses his individual identity and represent the identity of franchisor to the outside world, as in the case of 'McDonald' the customers are not concerned with who owns the 'McDonald's restaurant (franchisee). The customers identify it with 'McDonald (the franchisor)."*

f. Thus we do not find any merits in order of the Commissioner confirming these demands under the category of Franchisee Services.

4.3.2 Management Consultancy Service

a. The "Management Consultant" has been defined by the by Finance Act, 1994 as follows:

(65) "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 [relating to conceptualising, devising, development, modification, rectification or upgradation of any working system of any organisation'] substituted by phrase [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.]' with effect from 01.05.2006

b. As per the Agreement dated 15th January 2005,

"HAIL has entered into contracts with its customer Tata Consultancy Services Ltd ("Customer") for the supply of smart card based physical access control solution, access controller/ readers and associated software ("Products") to the Customer ("Contract") and require the services of the Contractor to provide project management services including but not limited to on site job coordination, delivery and job execution scheduling, technical support on

design of the solution and installation of the Products and related services thereto."

c. As per the Annexure-II PO No 38187 dated 18/07/2005, (Purchase Order of Honeywell Automation India Ltd) following is scope of work assigned to appellant:

1. Technical Support and consultancy on design of smart card.
2. Project Management, Scheduling and Delivery Coordination.
3. On site job coordination for front availability and implementation infrastructure.
4. Develop customized interface software between Honeywell EBI and Ultimatix
5. User acceptance test support to HAIL on solution developed.
6. Integration of solution developed with Ultimatix, CMC Biometric Solution and TCS smart card management system.
7. Work with Hail To stabilize the solution post implementation/ integration.
8. Work with hail for final acceptance test on the system developed.

c. From the scope of work as indicated above, Honeywell has contracted appellants to provide technical support and consultancy for developing a system of smart card for access control. Access Control is part of management system of any organization and is also covered by the term "logistic management". Since these services have been provided for logistic management or access control system of the organization the services provided will qualify under the category of Management Consultancy Services.

d. Appellants have relied upon the decisions in case of-

i. Hewlett Packard India Sales P Ltd [2015 (38) STR 663 (T-Bang)]

ii. Basti Sugar Mills Co Ltd [2007 (7) STR 431 (T-Del)]

iii. Valia Consultancy {2015 (38) STR 1175 (T-Mum)].

e. We do not find any support to the case of appellants from any of the said decisions. In case at 'i' interpreting the definition of Management Consultant as it existed prior to 1.05.2006, Tribunal held

4.1 *It is worthwhile to reproduce the definition of "Management Consultancy Service" at this juncture. "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, relating to conceptualizing, devising, development, modification, rectification or upgradation of any working system in any organization. The definition underwent some modification subsequently but the sum and substance of the activities of the management as contemplated under the provisions of Finance Act are as under:*

• *Any service, either directly or indirectly, in connection with the management of any organization in any manner.*

• *Any advice, consultancy or technical assistance, relating to conceptualizing, devising, development, modification, rectification or upgradation of any working system of any organization.*

• *In either case, focus has to be made to the term "management consultant" as understood in the above statutory definition.*

In view of the test laid down therein the present case will fall within the category of Management Consultancy Services.

f. The test laid down in case at ‘ii’ is as follows:

***“7.** The above definition makes it clear that what is envisaged from a consultant is advisory service and not the actual performance of the management function. In the present case, the appellant was in-charge of the operation of the factory and thus was performing the management function.”*

This case lays down the test that Management itself cannot be management consultant. Since that’s not the issue in dispute in present case we do not find that this decision is applicable.

g. The issue in consideration in decision at ‘iii’ was in relation to Consulting Engineer Services and not Management Consultancy Service. Hence that decision to is distinguishable.

4.3.3 Commercial Coaching and Training Services:

a. Commercial Training or Coaching as per Section 65(26) of Finance Act, 1994 means any training or coaching provided by a commercial training or coaching centre. As per Section 65(27) ibid, Commercial Training or Coaching Centre” is *any institute or establishment providing commercial training or coaching for imparting skill or knowledge or lessons on any subject or field other than sports, with or without issuance of a certificate and includes coaching or tutorial classes but does not include pre school coaching and training centre or any institute or establishment which issues any certificate or diploma or degree or any educational qualification recognized by law for the time being in force.*”

b. The definition is wide enough to cover the activity of training in the softwares developed by the appellant to their customers or representative of customer within its ambit if the same is provided separately and billed separately. The training imparted by the appellants for in respect of softwares developed by them for which they charge separately from their customers will definitely be covered by the above definition and will be taxed accordingly.

c. Appellants have relied upon the decisions in case of Punjab Communication [2012 (25) STR 89 T-Del)] and Bentley Systems (I) Pvt Ltd. [2017-TIOL-3714-CESTAT-DEL)].

In case of Punjab Communication Tribunal has laid down the law stating "*We have noticed that the Respondent was not providing any coaching or training to outsiders except the employees of the buyer concerns who were to use the machines purchased. The training is not appearing to be a primary commercial activity of the appellant nor also commercial activity of such nature as known to the fiscal laws was carried out by Respondent."* However the law has been laid down without examining the term of definitions as contained in Finance Act, 1994. The phrase *"The training is not appearing to be a primary commercial activity of the appellant"* is putting something in the law which is not intended by the legislature while defining the terms. The issue is not whether the training activity is primary activity of the appellant or not is immaterial in terms of the definition. If the training of any type is provided which is not falling within the exclusion category specified by the definition then definitely it is to be classified as taxable under that category. Similar reasoning has been adopted by the tribunal in case of Bentley Systems. In our view the issue for consideration can never be whether the activity is primary or ancillary but what needs to be examined whether it falls within the definition of taxable service and has been provided for a commercial consideration.

d. Since we find that in view of the specific finding that training in the software developed has been provided by the appellant for a commercial consideration the same is covered by the definition of Commercial Training and Coaching Services and is taxable accordingly. Thus we uphold the demand confirmed by the Commissioner against this service.

4.3.4 Management Maintenance & Repair Service:

a. Demand in respect of service provided by the appellants in respect of annual maintenance contracts of softwares, under taxable category "Management Maintenance and Repair Services" has been dropped by the Commissioner on the ground of limitation holding that extended period of limitation shall not be available. Revenue has challenged the said order referring to certain circulars dated 7.10.2005 and 7.03.2006, and amendments made subsequently. We are not impressed by any of such submissions. Commissioner has relied upon the letter dated 14.06.2005, which was issued specifically to the appellants stating that services provided by them are not taxable under this category. Revenue has sought to brush aside the letter stating that the same was in respect of Chennai Unit and not in respect of Hyderabad Unit, against whom this demand is made. The fig leaf distinction sought to be made do not help the cause of revenue. When a clarification whether write or wrong has been issued by the Board it should apply to all similarly placed units till it is withdrawn. However this letter is enough to give rise to bonafide doubt in the mind of a rationale person/ taxpayer. Issuance of this letter by the Board clearly shows one thing that appellants whether at Chennai or Hyderabad has brought the fact of their undertaking such activities to knowledge of Board. In case the revenue intended to change the opinion or demand the tax in respect of the same they should have done under normal period of limitation. The doubt and confusion in respect of taxation of these services under the category of Management Maintenance and Repair services is enough to uphold the order of Commissioner dropping the demand on ground of limitation. We do not find the decisions relied upon by the revenue to help the cause of revenue.

4.3.6 Manpower Recruitment or Supply Services:

a. It is not disputed by the appellants that they have in course of their business billed their clients on the basis of time spent by their employees. In cased of Future Focus Infotech India (P) Ltd. [2008 (18) STR 308 (T-Chennai)]

"Appellant has not stated under which of the items, he has rendered service under this category. The service should be one of IT Software for use by the client it is unthinkable that IT majors like TCS/Infosys would have requested the appellant to develop a software for them. In any case, so long as the definition of the Manpower recruitment or supply agency service is not changed, the service rendered would fall only under the category of manpower supply agency services. Further, the CESTAT have held in Diebold Systems P. Ltd. - 2008 (9) S.T.R. 546 that introduction of Service tax on a new service, presupposes its non-coverage in the already existing services.

As against the above, the definition of Man Power Recruitment or Supply Agency under Section 65(68), with effect from 16-6-2005 reads as :

"manpower recruitment or supply agency" means any commercial concern engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, to a client. The term 'commercial concern' was substituted by the term 'any person' with effect from 1-5-2006.

'Taxable service' means any service provided or to be provided to a client, by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or otherwise, in any manner'. The expression 'in relation to' has wide connotation. In Doypack Systems (P) Ltd. v. UOI, 1988 (36) E.L.T. 201 (S.C.), the Apex Court have ruled that, 'in relation to, would mean 'pertaining to'. Thus, the service of supply of manpower will fall under this service. The scope of this service is found explained in paragraph 22 of Service tax Instructions F. No. B1/6/2005-TRU, dated 27-7-2005. Paragraph 22.2 is extracted below for ready reference.

"A large number of business or industrial organizations engage the services of commercial concerns for temporary supply of manpower which is engaged for a specified period or for completion of particular projects or tasks. Services rendered by commercial concerns for supply of such manpower to clients would be covered within the purview of service tax."

Service tax is on the service rendered. The taxability has to be decided with reference to the activity undertaken. The principal purpose of the agreements is for supply of manpower, and following the judgment of Kerala High Court in Kerala Colour Lab Association v. UOI, 2006 (2) S.T.R. 554 (Ker.) = 2003 (156) E.L.T. 17 (Ker.), the services rendered by the appellant falls squarely within manpower supply services. Taxability is not dependent on the work turned out by the persons supplied. Supply of men precedes, and that is when the Service tax is attracted. The Mumbai Bench of CESTAT have held that the taxable event is rendering of service. [Commissioner of CX&Cus, Vadodara v. L&T Ltd., 2006 (4) S.T.R. 63 (Tri.-Mumbai.)]. Further, even placing men on loan basis is held to be covered under the definition of 'manpower *recruitment or supply agency' in the judgment reported in 2008 (10) S.T.R. 268 (Tri.-Mum.).*

The appellant admits to have paid Service tax under this category for the men supplied to IBM, and Cap Gemini. That being the case, there is no reason why they should not have discharged the liability on supply of manpower to TCS/Infosys.

Since there is no ambiguity, there is no need to resort to Section 65A(2)(a) for classification."

b. This decision has been followed by the Tribunal again in case of Future Focus Infotech India (P) Ltd [2018 (18) GSTL 441 (T-Chennai)] and Six Sigma Soft Solutions [2018 (18) GSTL 448 (T-Chennai)].

c. We do not have any reason to differ with the law already pronounced by the tribunal on the subject. The decisions referred to by the appellant in case of Shailu Traders [2018 (10) GSTL 462 (T-Del)] is in respect of job work undertaken in the premises of principal and hence is not on the same issue. The second decision in case of Cognizant Tech Solutions (I) Pvt Ltd [2010 (18) STR 326 (T-Chennai)] has been distinguished by the tribunal in case of Future Focus Infotech India (P) Ltd [2018 (18) GSTL 441 (T-Chennai)].

d. In view of our findings as such we hold that Service tax demanded under the category of Manpower Recruitment or Supply Services is maintainable on merits. However the matter needs to be reconsidered by the original authority for determining the issues of limitation and penalty.

4.4 Demand of CENVAT Credit disallowed for non production of documents.

4.4.1 A substantial amount of CENVAT Credit has been sought to be disallowed for the reason of non production of documents. Appellants claim that they are in possession of the documents and can produce the same before the adjudicating authority. In our view the end of justice will be met if the matter is remanded back to the adjudicating authority for affording the opportunity to appellants to produce the documents as prescribed by Rule 9 of CENVAT Credit Rules, 2004 for purpose of availment of credit. Commissioner should consider the documents produced by the appellants before him and then decide with regards the admissibility of CENVAT Credit against those documents.

4.5 Since the matter is being remanded back to Commissioner on various issues as discussed above, Commissioner should in remand proceedings also quantify the penalty to be imposed depending on his findings in remand proceedings and demand upheld by us in these appeals.

4.6 Thus we summarize the outcome of discussions as follows:

I. Demand of Service Tax on services provided by the appellants in category of-

i. Franchisee Service: Demand is not maintainable on merits
ii. Management Consultancy Services: Demand upheld
iii. Commercial Coaching and Training Services: Demand Upheld
iv. Management Maintenance & Repair Service: Order of Commissioner dropping the demand on ground of limitation upheld
v. Manpower Recruitment or Supply Services: Demand maintainable on merits but matter remanded for consideration of issue on limitation and penalty.

II Demand of CENVAT Credit disallowed for non production of documents: Matter remanded back to Commissioner to allow appellants to produce the documents as prescribed under Rule 9 of CENVAT Credit Rules, 2004, for determining the admissibility of CENVAT Credit.

III. Quantum of Penalty to be redetermined by the Commissioner after taking into account his findings in the remand proceedings and the demands upheld by us.

5.1 The appeals are disposed as indicated in para 4.6, supra, and matter remanded back to Commissioner as indicated therein. Needless to say Commissioner should afford proper opportunity of hearing to the appellants before deciding the matter. Since the matter is quite old Commissioner should dispose of the matter in remand proceedings within four (4) months of receipt of this order.

(Order pronounced in the open court on 18.03.2019)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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