

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Service Tax Appeal No. 87227 of 2014

(Arising out of Order-in-Original No. 33/RKS/ST/P-I/2012 dated 07.11.2012 passed by the Commissioner of Central Excise, Pune-I)

M/s. Tata Technologies Ltd.

Appellant

25, Rajeev Gandhi Infotech Park,
Hinjewadi, Pune 411 057.

Vs.

Commissioner of Central Excise & ST, Pune-I Respondent

ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Appearance:

Shri Vinay Jain with Shri Sachin Mishra, Advocates, for the Appellant
Shri Nitin Ranjan, Deputy Commissioner, Authorised Representative
for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

Date of Hearing: 20.07.2022

Date of Decision: 25.08.2022

FINAL ORDER NO. A/85807/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against order in original No. 33/RKS/ST/P-I/2012 dated 07.11.2012 of the Commissioner of Central Excise, Pune-I. By the impugned order following has been held:

"ORDER

31.1. I confirm the demand of Service Tax amounting to Rs. 1,48,90,191/ (Rupees One Crore Forty Eight Lakhs Ninety Thousand One Hundred and Ninety One Only] inclusive of Education Cess and SHE Cess, payable by the assessee under reverse charge mechanism in terms of Section 66A of the Finance Act, 1994, as detailed in Para 6 of the Show Cause

Notice dated 24-04-2012, under the provisions of Section 73(2) of the Finance Act, 1994 and order the assessee to pay the same forthwith.

31.2. I also order recovery of interest, at the appropriate rate(s) as applicable during the relevant period, on the demand of Service tax as confirmed at para 31.1 above, under the provisions of Section 75 ibid.

31.3. I impose a penalty of Rs.15,000/- only (Rs.5,000/- each for each S.T.-3 return), for their failure to file correct service tax returns, during the period from October, 2006 to March, 2008, as provided under Section 70 ibid, under the provisions of Section 77 ibid

31.4. I also impose a penalty of Rs.1,48,90,190/- (Rupees One Crore Forty Eight Lakhs Ninety Thousand One Hundred and Ninety Only], on the assessee, i.e. M/s Tata Technologies Ltd., Pune, under the provisions of Section 78 ibid. However, since penalty is being imposed on M/s TTL under Section 78 ibid, I do not propose to impose any penalty under Section 76 ibid, in view of the provisions of fifth proviso to Section 78 ibid, as discussed in para 30 above;

32. I also give an option to the assessee, i.e. M/s Tata Technologies Ltd., Pune, under first proviso to Section 78 of the Finance Act, 1994, to pay the reduced 25% of the penalty amount as imposed under Section 78, in para 31.4 above, only if M/s TTL pays the entire amount of Service Tax, as determined/ confirmed, in para 31.1 above, along with interest payable thereon as ordered in para 31.2 above as well as the reduced 25% penalty, within 30 days of the date of communication of this order.

33. This order is issued without prejudice to any other action that may be taken against M/s Tata Technologies Ltd., Pune, under the provisions of Chapter V of the Finance Act, 1994 and/ or the Rules made thereunder and/ or any other law for the time being in force."

2.1 The Appellant is providing software consulting and professional service. They have a branch in Korea ('TTL Korea') which into an agreement with M/s. Tata Daewoo Commercial Vehicle Company Ltd., ('TDCV, Korea') a Company incorporated in Korea, for the purpose of implementation and maintenance of the software and engineering design support services (SAP implementation). The agreement provided for both offshore and on-site services to TDCV Korea.

2.2 TTL Korea executed the onsite component of the services. The offsite component of the services was undertaken by the Appellant in India.

2.3 For the services provided by the appellant to TTL Korea the accounts were settled by raising the invoice and also debit notes claiming reimbursement of travel allowances etc.

2.5 TTL Korea raised the invoice for offsite and onsite component of the services on TDCV Korea. It also charged Korean VAT in terms of Korean VAT Regulations on the invoices raised by it on TDCV Korea. Entire payment was made by TDCV Korea to TTL Korea.

2.6 A show cause notice dated 24th April 2012 was issued to the appellant alleging that they had received onsite services from TTL Korea, as the services provided by TTL Korea to TDCV is on behalf of the Appellant. These services fall under the taxable category of "Business Auxiliary Service". These services fall under the category of "Service provided from outside India and received in India (Import of Service)". The Appellant is liable to pay service tax on the aforesaid services under Reverse Charge Mechanism in lieu of Rule 2(1)(d)(iv) of Service Tax Rules, 1994 read with Section 66A of the Finance Act, 1994.

2.7 The Show cause notice was adjudicated vide order dated 7.11.2012. The same was challenged by the Appellants before CESTAT. CESTAT vide its order No A/713/13/CSTB/C-I dated 15.3.2013 remanded the matter back to adjudicating authority. While remanding the matter CESTAT made following observations:-

5.1 *As per the agreement entered into between TTL & TTL Korea and TDCVL, TTL and TTL Korea have to render Information Technology Services to TDCVL in Korea. The services rendered consist of two components - onsite services rendered by TTL Korea and offshore services rendered by TTL. Nevertheless, the service recipient remained TDCVL and not anybody else, for which they have paid the consideration. As per the agreement, the invoices for the services rendered are raised by TTL Korea on TDCVL for both onsite as well as offshore services. It is also confirmed by the Counsel that VAT/GST liability has been discharged by TTL Korea at the time of supply of services to TDCVL. If that be so, the question of subjecting the same transaction to Service Tax in India at the hands of TTL would not arise at all.*

5.2 *Secondly, the C.B.E. & C. in the case of M/s. Tech Mahindra relating to IT Software services had clarified that onsite services rendered abroad would not be treated as service provided from India. In other words, the question of subjecting such transactions under Service Tax in India would not arise at all.*

5.3 *As regards the offshore services rendered by M/s. TTL to TDCVL, the same amounts to export of service in terms of Rule 3(2)(a) of the Export of Service Rules, 2005. Information Technology Software service is classifiable under Rule 3(1)(iii) as category-3 service which relates to service consumed abroad by the recipient who is situated outside India. To consider the transaction as export, two conditions have to be satisfied namely the service should be provided from India and should be used outside India and the consideration for the services rendered should be received in convertible foreign exchange. In the present case, it is not in dispute that these conditions have been satisfied for the offshore service rendered by TTL to TDCVL.*

5.4 *In the impugned order, these issues have not been examined at all by the adjudicating authority. Therefore, we are of the view that the matter has to go back to the adjudicating*

authority for fresh consideration of all the issues involved, namely, whether the transaction is liable to Service Tax in India at all since the service has been rendered abroad and VAT/GST liability has been discharged abroad. The adjudicating authority should also give a finding, as to why the offshore services rendered by TTL India cannot be considered as "Export of Service" under Rule 3(1)(iii) read with Rule 3(2)(a) of the Export of Service Rules, 2005. The appellant is also directed to produce the evidence towards discharge of VAT liability on the services rendered in Korea under the Korean laws."

2.8 Matter in the remand proceedings has been adjudicated as per the impugned order referred in para 1, above. Aggrieved appellants have filed this appeal

3.1 We have heard Shri Vinay Jain with Shri Sachin Mishra, Advocates for the appellant and Shri Nitin Ranjan, Deputy Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits:

- The appellant and TTL Korea have jointly provided the services to TDCV. Therefore, there cannot be provision of any service by TTL Korea to the appellant.
- TTL Korea is not providing any services to the appellant. In fact, the appellant are rendering services to TTL Korea.
- The SAP implementation services provided by TTL Korea in the nature of Information Technology Software Service (ITSS) and hence not liable to service tax prior to 16.05.2008.
- The services rendered by TTL Korea are not classifiable as Business Auxiliary Service (BAS) on behalf of appellant, in the absence of principal-agent relationship and hence not taxable under Business Auxiliary Service (BAS).
- Service tax cannot be levied on the transaction between overseas branch and head office in India which is engaged in exporting the services outside India as this is against the objective of the legislation to introduce section 66 A in the finance act, 1994. In any case. The services were

neither received in India not used for any business or commerce in India and hence, not liable to be taxed in India. As per following decisions:

- KPIT Cummins Infosystems Ltd. [2014 (33) STR 105 (T-MUM)];
- 3i Infotech Ltd. [2017 (51) S.T.R. 305 (Tri. - Mumbai)];
- Milind Kulkarni [2016 (44) S.T.R. 71 (Tri. - Mumbai)]
- ITSS services were expressly excluded from the ambit of "Business Auxiliary Services" and "Consulting Engineer Services" during the period in dispute.
- The offshore services rendered by TTL Korea are indeed exports in terms of export of services rules. 2005as in present case both service provider and recipient are located outside India
- The value of the taxable service is required to be recomputed. The demand, if any, can only be on the portion of on-site services rendered by TTL, Korea. There can at least be no demand on that portion of the activity that was performed by the Appellant themselves and was not at all performed by TTL, Korea.
- The impugned order has travelled beyond the SCN. Hence, it is liable to be struck down.
- Levy of service tax on the said services would amount to double taxation, as TTL Korea has paid the Korean VAT. In this regard, reliance is placed on Torrent Pharmaceuticals Ltd. vs. CST, 2015 (39) S.T.R. 97 (T).
- Extended period of five years is not invokable in the present case. Hence, The demand in dispute seeking to recover service tax beyond normal period of limitation of one year is time barred.
- As he Appellant is not liable to pay service tax, they cannot be subjected to penalty under section 77 or 78 of the Finance Act, 1994. Similarly, no interest under section 75 can be demanded from the Appellant.

3.3 Arguing for the revenue learned authorized representative while reiterating the findings recorded in impugned order submits:

- TTL Korea has rendered the services to Appellant for which they have received consideration from TDCV Korea and, therefore, appellant is liable to pay the Service Tax on Reverse Charge basis under Section 66A on the entire amount received from TDCV by TTL Korea.
- The services rendered consist of two components - onsite : services rendered by TTL Korea and offshore services rendered by appellant.
- The contract is between appellant and TDCV Korea for supply of services to TDCV Korea.
- The nature of service provided by Tata Technologies Ltd., Korea is Business Auxiliary Service (BAS).
- As per Section 66A(2) of Finance Act, 1994 TTL Korea and appellant are separate legal entities. Therefore, the tax on the BAS service provided by TTL Korea to appellant has to be paid by appellant under RCM basis in India.
- TTL Korea has provided 'services on behalf of appellant to TDCV. These services and the amount paid has been enumerated separately in the contract between Appellant and TDCV.
- It has been held in a catena of judgments that the nature of payment arrangement does not change the substantive nature of service which has to be derived from the contract.
- The nature of such service has been held to be BAS and not Information Technology Software Service in a catena of judgments and also by the Bombay High Court in the case of CITI BANK N.A. [2018 (18) G.S.L.L. 580 (Bom.)].
- Several cases have held that when such services were provided by the India subsidiaries to their foreign holding companies, the nature of the service was BAS and also the service was said to be provided by the India subsidiaries to their foreign holding companies. Subsequently, in these

cases the benefit of export was extended to these companies.

- Here, it was held that it is location of the recipient of the service which is pertinent. Here, it is an admitted fact that the location of the service receiver, appellant is in India .Hence, as per Section 66A(2) of Finance Act, 1994, appellant is required to deposit tax on an RCM basis.
- TTL Korea has made its financial records independent from appellant. Also, it only treats the amount of consideration paid for its on-site service to TDCV Korea as its income. Also, it has no contract with to TDCV Korea but only with appellant to provide services on its behalf.
- The fact that VAT has been paid by TTL Korea in Korea has no implications on the taxation in India. These are independent sovereign tax. There is no double taxation agreement between Korea and India regarding this
- Revenue Neutrality will not be able to help the App. in this matter. As per the findings, in the matter of JAY YUHSHIN LTD. [200 (119) E.L.T. 718 (Tribunal - LB)], where it has been held that Where the scheme opted for by the assessee is found to have been misused (in contradiction to mere deviation or failure to meet all the conditions) the existence of an alternate scheme would not be an acceptable defence.
- While applying Rules 3(1)(iii) and 3(2) of the Export of Services Rules, 2005 in CITI BANK N.A. (2018 (18) G.S.T.L. 580 (Bom.)), in a case of Indian subsidiary which was providing services on behalf of its parent foreign entity, Hon'ble High Court held that :
"Custodial services provided by banking and financial services provider to foreign institutional clients - Covered by sub-clause (iii) of Rule 3 of Export of Services Rules, 2005 and assessee would be entitled to its benefit - C.B.E. & C. Circular No. 111/5/2009-ST. dated 24-2-2009 clarifying that in respect of such services, relevant factor was location of services recipient and not place of

performance and that phrase 'outside India' was to mean that benefits of service was to accrue outside India"

4.1 We considered the impugned along with the observations made by the tribunal while remanding the matter, submissions made in the appeal and during the course of arguments:

4-2 Commissioner has in the impugned order on the merits of the issue has observed as follows:

"13. On perusal of the records of the case as well as the Show Cause Notice, I find that during the relevant period, i.e. October, 2006 to March, 2008, the assessee i.e. M/s TTL had an overseas branch in South Korea (hereinafter referred to as "TTL Korea"), who was engaged in providing services to their client viz. M/s Tata Daewoo Commercial Vehicle Company Ltd., Korea (hereinafter referred to as "TDCV Korea") on behalf of the assessee, i.e. M/S TTL. The said overseas branch had an independent legal status in South Korea and all the remittances for the assignments entered into by M/S TTL and TDCV Korea, were received directly by the branch. The Overseas branch in South Korea has since reportedly stopped their activities after 31.03.2008.

14. The investigations conducted in the matter revealed that TTL Korea, who was providing services on behalf of the assessee, being separate legal entity as per the provisions of Section 66A of the Finance Act, 1994, were providing Business Auxiliary Service', as defined under Section 65(19) of the Act and therefore, Service Tax on such services was liable to be paid by M/s TTL on the amount recovered by TTL Korea, from their client, under the reverse charge mechanism, in terms of Section 66A of the Act.

15. Accordingly, a Show Cause Notice dated 24-04-2012 was issued to the assessee, demanding Service Tax of Rs.1,48,90,191/-, for the period October, 2006 to March, 2008, which has been calculated, considering the payments received by TTL Korea, from TDCV Korea, along with interest at the

appropriate rate during the material period and also proposing penal action on the assessee.

16. I find that the main issues, therefore, to be decided in the present case may be summed up as under:

- (i) Whether TTL Korea, were providing any service to M/s TTL and whether M/s TTL are liable to pay Service Tax on the same;*
- (ii) Whether TTL, Korea were providing Information Technology Software Service;*
- (iii) Whether Head office of M/s TTL in India can be regarded as a 'Permanent Establishment in India';*
- (iv) Whether the demand is liable to be restricted to the onsite services provided by the overseas branch as contended by M/s. TTL;*
- (v) Whether there is a case of revenue-neutrality and whether the extended period is invokable to demand Service tax for the extended period;*
- (vi) Whether there is any willful suppression of material facts, on the part of the assessee in this case and whether extended period is invokable to demand Service tax for the period beyond one year;*
- (vii) Whether interest is payable by M/s TTL, on the amount of Service tax demanded / payable by them; and*
- (viii) Whether penalty is imposable on M/s TTL under the provisions of Sections 76, 77 and 78 of the Finance Act, 1994,*

17. At the outset, it will be appropriate to recap the relevant provisions of the Act, relevant to this Show Cause Notice, which are reproduced as below:

.....

18. Now, I take up the issues mentioned in para 16 above one by one.

Whether TTL Korea, are providing any service to M/S TTL and whether M/s TTL are liable to pay Service Tax on the same :

19.1. I find that, as per the provisions of section 66A(2) of the Finance Act, 1994 (as reproduced in para 17.2 above), Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section'. Further, as per Explanation-I to the provisions of said Section 66A(2), 'A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country. The overseas branch of the assessee, M/S. TTL, i.e. TTL Korea, being an extended arm of M/s TTL, but a separate entity as per the provisions of Section 66A, are thus to be treated as a separate person for the purpose of the said Section and hence, it is clear that as per the provisions of Section 65(19) of the Finance Act, 1994, TTL Korea, were providing Business Auxiliary Service' to M/s TTL.

19.2 Further, as per the provisions of Section 66A(1) of the Finance Act, 1994, Where any service specified in clause (105) of Section 65 is,

- (a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided Or to be provided or has his permanent address or usual place of residence, in a country other than India, and*
- (b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India, such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the*

service in India, and accordingly all the provisions of this Chapter shall apply:

Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply: Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the service is provided or to be provided.

19.3 Hence, I hold that as per the above said provisions, M/s TTL are liable to pay Service Tax, being the recipient of service. Here, I find that, TTL Korea was providing services to their client i.e. TDCV Korea, and collecting charges from them on behalf of M/s TTL. As TTL Korea, was providing services to TDCV Korea, on behalf of M/s TTL, the amount collected by them from the said client, were the amount, received by them from M/s TTL, as the amount received by them are in fact the charges of the service provided by them on behalf of M/s TTL.

(ii) Whether TTL, Korea was providing Information Technology Software Service :

20.1. It has been contended by M/s TTL that the SAP implementation services provided by TTL Korea, were in the nature of Information Technology Software Service and hence the same are not liable to service tax prior to 16-05-2008. M/S TTL have placed reliance in this regard on the decision of Hon'ble CESTAT in the case of M/s SAP India Pvt. Ltd. Vs CCE, Bangalore, 2010-TIOL-1569 CESTAT-BANG., wherein it was held that SAP implementation service is covered under the category of Information Technology Software Service (ITSS) and not taxable prior to 16.05.2008. M/s TTL have also placed reliance on the decision of Hon'ble CESTAT in the case of EBZ Online Pvt.

Ltd. Vs CCE, 2011(22) STR 185(Tri.-Mumbai), wherein a similar view was taken.

20.2. The above contention of the assessee is, however, not acceptable, as the issue raised in the subject Show Cause Notice relates to the service provided by TTL Korea, to M/S TTL and not to TDCV Korea. The contention of M/s TTL that since TTL Korea, was providing SAP implementation services, which was in the nature of Information Technology Software Service, the same is not liable to service tax prior to 16-05-2008, is not acceptable - as the issue involved in this case does not relate to the taxability of category of the services provided by TTL Korea, to TDCV Korea. In the subject case, TTL Korea, was providing SAP implementation services to TDCV Korea, on behalf of M/s TTL, and hence as per the provisions of Section 65(19) of the Act (as reproduced in para 17.1 above), TTL Korea, were providing Business Auxiliary Service to M/s TTL, I therefore do not accept the contention of the assessee that the services provided by them fall under the category of ITSS, and hence the same is liable to be rejected.

(iii) Whether Head office of M/s TTL in India can be regarded as a 'Permanent Establishment in India':

21.1. M/s TTL in their written submissions dated 02-07-2012 have contended that the head office of M/s TTL in India cannot be regarded as "Permanent Establishment in India". During the course of Personal Hearing held on 19.10.2012, the authorized representatives of M/s TTL, have submitted a copy of relevant pages of Model Tax Convention on Income and Capital'. The term "Permanent Establishment" has been defined at Chapter II , Article 5 of the said Model Tax Convention on Income and Capital', which is reproduced below for easy reference :

- 1. For the purpose of this convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.*
- 2. The term "permanent establishment" includes especially:*

- (a) A place of management;*
- (b) A branch;*
- (c) An office;*
- (d) A factory;*
- (e) A workshop, and*
- (f) A mine, an oil or gas well, a query or any other place of extraction of natural resources.*

(Emphasis provided)

21.2. As per the provisions of section 66A(2) of the Act (as reproduced in para 17.2 above), Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section'.

Explanation-1- A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country. Explanation-2 - Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.

21.3. I find that through Explanation-1 to the provisions of Section 66A(2) of the Act, it is clarified that a person carrying on a business through a branch of agency in any country shall be treated as having a business establishment in that country, and hence, it is clear that here permanent establishment means basically a business establishment. Since the Head Office of M/s TTL is a business establishment, the same has been correctly considered as Permanent Establishment in India'. Further, as defined at Chapter II, Article 5 of the 'Model Tax Convention on Income and Capital', as relied upon by the representatives of M/s TTL, during the course of Personal Hearing held on 19.10.2012, "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on. Further, the term "permanent establishment" includes especially a place of management, a branch, an office, a factory, a workshop, and a mine, an oil or gas well, a query or

any other place of extraction of natural resources. On careful reading of the above, I find that the above submissions, made by M/s TTL, in fact, do not support their case, since as per the said submissions, as explained above, the Head Office of M/s TTL is very well covered under the definition of "Permanent Establishment" and correctly regarded as "Permanent Establishment in India". Therefore, the assessee's submission/contentions that Head office of M/s TTL in India cannot be regarded as a 'Permanent establishment in India' is totally untenable and liable to be rejected.

(iv) Whether the demand is liable to be restricted to the onsite services Provided by the overseas branch:

22.1. It has been contended by M/s TTL that TTL Korea, has performed only the on-site portion of the services and the off-shore portion of the services were performed by TTL India, and hence there can at least be no demand on that portion of the activity that was performed by TTL India.

22.2. Here I find that in their written submissions dated 02-07-2012, at Para A.4., M/s TTL, have submitted as under :

"-----The agreement between the parties specifically referred to the branch office in Korea. This shows that the obligation of rendering the service to TDCV Korea, was on TTL (as a company) through its branch in Korea and not on any particular branch in India. This strengthens the submission that the direct obligation of rendering the entire gamut of service including off-site and on-site services was on TTL Korea". Further, at Para A.8, M/s TTL have mentioned, "It is further submitted that TTL Korea was discharging the liability under Korean VAT on both the off-shore as well as on-site services". Here, I find that the obligation of rendering the entire service was on TTL Korea, and also the entire amount of payment was received by TTL Korea, which confirms the fact that the demand on the entire amount billed by TTL Korea is liable to be raised on M/s TTL, as TTL Korea provided the entire service to TDCV Korea, on behalf of M/s TTL, and hence the amount collected by

them from TDCV Korea, were the amount, received by them from M/s TTL, as the amount received by them were in fact the charges of the services provided by them on behalf of M/s TTL. Hence, the assessee's submission that the demand of Service Tax is liable to be restricted to the onsite services provided by the overseas branch cannot be accepted, and hence is liable to be rejected and I hold accordingly."

4.2 The relevant extract of the agreement between the TTL Korea and TDCV reads as under:

ARTICLES OF Agreement

made on the 27th day of September 2005

BETWEEN

TATA TECHNOLOGIES LIMITED, a company incorporated under the Indian Companies Act, 1956 and having its registered Office at Plot No 25, Pune Infotech Park, Hinjawadi, Pune, 411057 and having Branch Office at Rm 1132, Doosan We've Pavilion Bldg, 58 Sisong-dong Jongno-gu, Seoul 110-140, Korea called or referred to as "TTL" or the "Company" (which expression shall, unless repugnant to the context or meaning thereof shall and include its successors in title and assigns)

OF THE ONE PART

AND

TATA DAEWOO COMMERCIAL VEHICLE Company limited, a corporation organised and existing under the laws of the Republic of Korea with its principal office at 1589-1, Soryong-Dong, Gunsan, Cheonbuk 573-715, Korea, hereinafter referred to as "TDCV" or the 'Client' (which expression shall unless repugnant to the context of meaning thereof include its successors in title and assigns)

OF The OTHER PART

AND WHEREAS the company provides through its employees software consulting and professional services in support of

implementation & maintenance of the Software which the client desires to obtain.

AND WHEREAS the

AND WHEREAS the company desires to provide implementation services to the client for the implementation of the relevant components of SAP 4.6C in SAP R/3 4.6C as per implementation proposal referred to above.

AND WHEREAS, the company takes single point responsibility for successful implementation of SAP in TDCV. Under a separate and distinct agreement entered between TDCV and Daewoo Information Systems (DIS), TDCV have arranged with DIS to actively participate and sup[port with skilled consultants to ensure effective interface from the point of view of both language (fluency in English and Korean) and local business requirements.

1. DEFINITIONS

a) In this agreement (including the Annexures attached hereto) the following words will have the meaning assigned to them as under:

.....

"Contract Price" shall mean the fees payable on time and material basis as specified section 6 of this agreement, to be paid by TDCV to TTL for performance of the Work under this Contract.

.....

"Job Site" shall mean TDCV premises located at 1589-1, Soryong-Dong, Gunsan, South Korea, TTL office in Seoul, South Korea and TTL STP Unit at Development Center, MSD Building , Tata Motors Ltd Premises, Jamshedpur-831010, India.

.....

3 SCOPE OF CONTRACT:

a

b Services will be rendered by TTL, in respect of implementation of SAP 4.6C at TTL premises in Korea, TDCV Premises in Gunsan, Korea and TTL STP Unit at Development Center, MSD, Building, Tata Motors Ltd. Premises, Jamshedpur 831010, India in accordance with the detailed provisions in Annexure-I and Annexure-II.

c

d. TDCV agrees to pay TTL the consideration, including all applicable taxes and other incidentals associated with this agreement.

6. PAYMENT OF CONSULTANCY FEES

6.1 TTL will be paid a lump sum fee of US\$ 1,002,000 (US Dollars one million and two thousand only), including living allowance to TTL consultants working on the Project and based in Korea and India, in twelve equal monthly installments of US \$ 83,500 each commencing April 2005 until the project is completed or until 12 monthly payment whichever occurs first. If the project extends beyond 12-1/2 months, including "post-go-live support" and does so due to delay caused by TTL, then no additional payments will be made to TTL. TTL will work until all the agreed deliverables have been achieved.

6.2 TTL Korea shall raise twelve monthly tax invoices on a fixed bid basis as given below

US\$ 83500. This would consist of \$45000 for Onsite SAP Implementation service at Gunsan Korea, US\$ 38500 for Offshore SAP Implementation Services at STP Unit at Development Center MSD Building, Tata Motors Ltd. Premises, Jamshedpur-831010, India.

.....

6.3 TTL Korea Branch shall raise a tax invoice on TDCV for expenses as referred to in Clauses "5g" & "5h" and reasonably incurred for this project together with the entire original supporting documents.

....."

Above terms of agreement make it clear that the offshore work is undertaken by the Appellant in India and onsite work is undertaken by the employees either deputed at the TDCV's site or TTL Korea Branch premises at Seoul.

4.5 Undisputedly, TTL Korea had entered into agreement with TDCV Korea for provision of certain services. TTL Korea entered into agreement with the appellants for provision of offsite services. Appellants executed the offsite portion, as was sub contracted to them. For the services rendered by them to TTL Korea, Appellant raised the invoice and also raised debit note on TTL Korea for reimbursable expenses incurred by them for providing these services. TTL Korea for the services provided to TDCV Korea raised the invoices for both off-shore and onsite services. TTL, Korea discharged liability under Korean VAT on both the offshore as well as on-site services. There is not even whisper of any invoice being issued by TTL Korea on the appellant for any services provided by the Appellant to them.

4.6 Even if it is held that the contractual agreement for the provision of service was between appellant and TDCV Korea, then also the service is provided by the appellant to their client in Korea and no service is provided to any one in India. The appellants have for the provision of the said service has not raised any invoice on their branch office located in Korea. Nor the branch office has raised any invoice on the appellant in respect of any services provided by them to TDCV as per the agreement referred above. TTL Korea has raised the invoices on the TDCV for the entire contract price as per the clause 6.1 and 6.2 of the agreement. Nothing has been brought on record in the impugned order to show that TTL Korea was raising the invoices or receiving payments from appellant in any manner for provision of the onsite services to TDCV.

4.7 In case of KPIT Cummins Infosystems Ltd. [2014 (33) STR 105 (T-MUM)] following was held:

"5.1 The provisions of Section 66A are attracted only when services are received in India by a person situated in India even

if such persons may have permanent establishment abroad. In the present case, the appellant has provided services through their branches abroad to customers located abroad. Therefore, it is not a case of the appellant receiving the services but it is a question of rendering services abroad. Further, the appellant has not made any payments for the receipt of any services whereas on the other hand, the appellant has received proceeds of the service rendered abroad by their branches, after deduction of expenditure incurred for rendering of services abroad. Therefore, prima facie, we are of the view that the provisions of Section 66A are not at all attracted.

5.2 Secondly, if the services rendered abroad have been subject to local taxation, the question of levying Service Tax in India on the very same transactions would not arise at all. There cannot be two taxing jurisdictions for the same transactions. Service tax is a destination based consumption tax and taxability would arise only at the place where the consumption takes place. In the instant case, the service has been rendered to the clients abroad and, therefore, the consumption of the service is not in India but abroad. Therefore, the question of subjecting the said activity to Service Tax in India does not appear to be sustainable in law. The appellant has assured that they will be able to lead evidence regarding payment of GST/VAT on the services rendered abroad if opportunity is given to them.

5.3 Thirdly, even if it is assumed that the appellant has received the service from abroad from their branches, since the service have been consumed by the clients abroad, it would amount to export of service under Rule 3 of the Export of Service Rules, 2005 in which case also there would not be any Service Tax liability. In the case of permanent establishment of the appellant situated abroad, the service has been provided by foreign service providers abroad and the service has also been consumed abroad.

5.4 In this view of the matter, it appears that the adjudicating authority has not considered any of the issues germane to the

matter. Further, this Tribunal in the case of Intas Pharmaceuticals Ltd. (supra) held that when service is provided outside India, liability to pay Service Tax under reverse charge mechanism under Section 66A would not arise. Similarly, in the case of IDS Systems Pvt. Ltd. also this Tribunal held that, as regards reimbursement of expenditure relating to employees deputed to USA, the activities have taken place in USA and therefore, liability to Service Tax would not arise. In the case of Aztescsoft Ltd. also, this Tribunal held that, if the activities have been undertaken in a foreign territory, the question of levying Service Tax in India would not arise.”

4.6 In case of Torrent Pharmaceuticals Ltd. [2015 (39) STR 97 (T-AHM)] following was held:

“5.3 *On the issue of demand of service tax of Rs. 11,56,32,589/- with respect to remittances made by the appellant to branch offices, both sides have relied upon the case law of M/s. British Airways v. CCE (Adj.) Delhi [2014-TIOL-979-CESTAT-MUM]. It is the case of the appellant that nearly Rs. 7 crore demand is with respect to salary of the employees of the appellant working in the foreign branch offices, treating the branch offices/establishments as service providers held by Revenue as a separate legal entities under the provisions contained in Section 66A(2) of the Finance Act, 1994. Senior Advocate appearing on behalf of the appellant strongly argued that in the light of provisions contained in Section 66A(2) of the Finance Act, 1994, the explanation-I has to be read only to clarify the place of services provided and not for the purpose of creating another service tax liability for an activity provided to self. For the remaining demand of service tax, it is the case of the appellant that this demand pertain to services availed abroad by the branch offices/establishments as separate legal entities, on which VAT/GST of the relevant country was discharged by branch offices directly and receipt of these services is nothing to do with the appellant situated in India. It was fairly agreed by the learned Advocate that where local VAT/GST of a foreign*

country was not paid by the branch offices and billing was directly made by the foreign service providers to the appellant then in such cases service tax on reverse charge basis is required to be paid, which is being paid by the appellant even if the payment of such services availed and consumed in India were routed either through appellant's branch office or distributors.

5.4 Before giving our observations, it is relevant to glance through the provisions of Section 66A(1) of the Finance Act, 1994 reproduced below :-

"66A. Charge of service tax on services received from outside India. - (1) Where any service specified in clause (105) of section 65 is,

(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and

(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India, such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply :

Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply:

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is

located, shall be treated as the country from which the service is provided or to be provided.

(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

Explanation 1. - A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country.

Explanation 2. - Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted."

5.5 Section 66A (1) above is talking of service provider and service recipient as 'persons' which has to mean as different business persons. Section 66A(2) and its Explanation I only make a clarification and to fix service tax liability on recipient of services under reverse charge mechanism that both the permanent establishments in India and abroad of a business person are to be treated as separate persons. The above clarification/distinction made in Section 66A in our opinion is only for making an identification to determine whether a service is provided and consumed in India or abroad. It is an accepted legal position that one cannot provide service to one's own self. If the 'permanent establishment' of the appellant abroad is treated as a service provider to its own head office in India then it will amount to charging service tax for an activity provided to one's own self. Similarly placed branches of the appellant undertaking similar activities in India will not be held so. Therefore, a comprehensive reading of Section 66A of the Finance Act, 1994, a permanent establishment situated abroad as a 'separate person', will be understood to have been prescribed only to determine the provision of service whether in India or out of India. Theoretically it could be possible that a person carrying business through a permanent establishment

abroad may like to pay lower rate of local VAT/GST abroad to avoid service tax payment in India by showing the services to have been availed abroad. However, there is no likelihood of such avoidance in case of an assessee who is eligible to Cenvat credit in India for the service tax payable in India for which the assessee is entitled to Cenvat credit. It is also not the case of the of the Revenue that appellant is not capable of utilising Cenvat credit admissible as they have paid more than Rs. 12,000 crores as taxes during the periods 2007-2008 to 2011-2012.

5.6 At this stage it will be relevant to examine the judgment of M/s. British Airways v. CCE (Adj.), Delhi (supra) relied upon by either sides.

5.6.1 The facts of this case were that M/s. British Airways PLC (BA, UK); with its registered office at Harmondsworth, UK; were an Airline engaged in providing the service of transportation of passengers and Cargo by air throughout the world. BA (UK) also had a branch office in India (BA, India). BA (UK) entered into agreement with several CRS/GDS companies for maintaining database regarding flight schedules of BA (UK) Flights, fares, seats availability etc. and this information was made available to IATA agents of British Airways all over the world including BA (India). All the CRS/GDS companies were located outside India and had no branch office in India. CRS/GDS companies also provided certain hardware to IATA agents for providing connectivity for retrieving data and bookings etc. Entire payment to CRS/GDS was made by BA (UK) based on the number of tickets issued by IATA agents. It was the view of the Revenue in that case that services availed by IATA agents in India are liable to service tax under reverse charge as services received in India. Para 31.2 (5) and (6) of this case law is the view recorded by Member (Technical), which became majority view and is reproduced below :-

"31.2

(5) *When the service has been received by the Head Office of the appellant at UK against its agreements with CRS/GDS Companies and as accepted in the impugned order, entire payment has been made abroad by the Head Office directly to CRS/GDS Companies and when in view of the provisions of Section 66A (2), the appellant-BA, India and their Head Office at UK, BA, UK are to be treated as separate persons, the entire transaction of provisions of service has to be treated as having taken place outside India and the service received by the Head Office at UK cannot be treated as service received by the Appellant, in India.*

(6) *In my view, the only situation where in respect of the service provided by a service provider 'A' located outside India against as agreement/ contract with Head office of a company 'B', incorporated outside India i.e. located outside India, the service tax can be charged from the branch office 'B-I' in India of the Company 'B' when :-*

(a) *the Headquarter of the Company 'B' has entered into a framework agreement/ contract with the service provider 'A' by the way of centralized sourcing of service for Provision of service at various branches located in different countries including India; and*

(b) *the service has been provided at the branch in India and the role of the Headquarter is only as a facilitator.*

In such a situation service tax can be charged from the branch office in India by treating it as service recipient even if the payment for the service received was made by the head office, as in such a situation, the Indian branch office can be treated as having made the payment indirectly. But in this case, as discussed above, from the agreements of 'BA, U.K.' with CRD/GDS Companies, it is seen that there is nothing in these agreement from which it can be inferred that the CRD/GDS Companies were required to provide location specific service to the branches of 'BA, U.K.', all over the world. There is neither allegation nor evidence that 'BA, U.K.' have charged any amount

from the Appellant directly or indirectly by way of the debit/ credit notes, account adjustment or by other indirect means, for any services provided by the CRS/GDS Companies."

5.7 From the above interpretation made in the case of M/s. British Airways v. CCE (Adj.), Delhi (supra) it has to be seen in the present proceedings whether while procuring services branch offices of the appellant abroad have acted only in the capacity of 'facilitators' and the services so procured were consumed in India or the services so availed were consumed outside India. Learned Senior Counsel appearing on behalf of the appellant relied upon guidelines of 2006 & 2008, issued by Organisation for Economic Co-operation and Development (OECD) Centre for Tax Policy & Administration, Paris; on "Emerging concepts for Defining Place of Taxation on VAT/GST to cross Border Trade in Services and Intangibles". Para 8 to 13 of this paper of January 2008, reproduced below, give a glimpse of international thinking on the place of taxation of services and its underlying concepts :-

"2. Underlying concepts

8. VAT/GST is generally charged at all stages of the economic process, but with the provision of a mechanism enabling firms to offset the tax they pay on their own purchases of goods and services (input tax) against the tax they charge on their sales of goods and services (output tax). Accordingly, most businesses can recover all, or most, of the input tax they pay as an offset against the output tax they charge. However, customers who are not identified for VAT/GST, or are not required to be so identified and report (e.g., businesses below the turnover thresholds that apply in some countries or private consumers), cannot recover the tax. Moreover, under most VAT/GST systems even businesses identified for VAT/GST or suppliers that make supplies of goods or services that are exempt from VAT/GST can recover input tax only to the extent that they also make taxable supplies. Similarly, as a matter of tax policy, some systems deny or restrict recovery of input tax incurred on particular

expenditures e.g. cars or business entertainment, to reflect non-business or private use. This unrecoverable tax is an intentional part of the VAT/GST system. Customers to which recovery of input tax is denied in such circumstances are treated as if they are final consumers.

9. The main rule defines the place of taxation on the basis of customer location and in normal circumstances should be applied to determine the place of taxation. The identity and the jurisdiction where the customer to which the supply is made is located will then be normally supported by the relevant business agreements, as it is expected that business agreements generally reflect the underlying transactions and financial flows. Only in specified or exceptional circumstances should the place of taxation vary from the main rule.

10. For VAT/GST, a number of factors must exist before the tax can be charged in a particular place. There has to be, for example, a supplier, a customer, a supply and a place of taxation rule to determine the jurisdiction in which any tax should accrue. To ensure that the basic principles of neutrality, efficiency, flexibility, certainty and simplicity are achieved these, and some other, terms will need to be defined at a later stage, drawing on the lessons learned from the development of these business models and examples.

11. As a first step, it was agreed that the development of guidance on how to implement the main rule in practice should start by the examination of a selection of basic concepts as listed above (i.e. supplier, customer, supply) on the basis of simple practical examples, involving simple supplies.

3. Tax Collection Mechanisms

12. It is recommended that the business customer should account for VAT/GST, where applicable, on cross-border business-to-business (B2B) transactions using the reverse charge, self-assessment or tax shift mechanism (hereinafter reverse charge mechanism), as far as this type of mechanism is consistent with the overall design of the national consumption

tax system. Once the place of taxation is determined, the country that has the right to tax the supply decides whether any tax is actually due. For example, countries may wish to consider dispensing with the requirement to reverse charge the tax in circumstances where the customer would be entitled to fully recover it through deduction or input tax credit. However, the examples that follow assume use of this mechanism as the means of accounting for the tax. There may well be issues connected to reverse charge that will need addressing at a later stage, but for the moment the working assumption is that this mechanism is appropriate.

13. In these circumstances the reverse charge mechanism has a number of key advantages. Firstly, the tax authority in the country of consumption can verify and enforce compliance since that authority has jurisdiction over the customer. Secondly, the compliance burden is shifted from the supplier to the customer and is minimised since the customer has full access to the details of the supply. Thirdly, the compliance costs for the tax authority are also low because the supplier is not required to meet tax obligations in the customer's country (e.g. VAT/GST identification, audits, which would otherwise have to be administered). Finally, it reduces the revenue risks associated with the collection of tax by non-resident suppliers, whether or not that supplier's customers are entitled to deduct the tax or recover it through input tax credits."

5.8 In the light of the emerging international concepts on reverse charge mechanisms and the judgment of M/s. British Airways v. CCE (supra), the foreign branches/establishments of the appellant have not acted as 'facilitators' but have actually consumed those services abroad for which local VAT/GST of the respective country has been paid. The representative invoices produced by the appellant indicate that local VAT/GST paid is 'Nil' when billing by overseas service providers is directly raised upon the appellant in India on which service tax is paid by the appellant on reverse charge basis. When billing is raised on the

branch office for a service consumed abroad then local VAT/GST applicable abroad is paid by the branch offices on such transactions. Therefore, payment of local VAT abroad will be an indicator to decide whether a service is provided and consumed outside India or has been consumed/received in India. The agreements/documents available with the appellant have to be accepted for the purpose of determining place of providing and consumption of a service in India, as no foul play can be anticipated in the case of appellant who is paying thousand of crores of rupees as service tax and is also eligible to Cenvat credit of the service tax payable on reverse charge basis."

4.7 In case of 3i Infotech Ltd. [2017 (51) S.T.R. 305 (Tri. - Mumbai)] tribunal has held as follows:

"10. We have addressed this issue in our decision in re Tech Mahindra which examined the nature of overseas branches of a software exporting entity headquartered in India. Having considered the provisions of Section 66A(2) of Finance Act, 1994 and the role of the overseas branches, we held that the symbiotic business and structural relationship is not susceptible to interpolation into the specific context of Section 66A and each transaction of the overseas branch would have to be scrutinized to ascertain if taxable service has been rendered by branch to headquarters and vice versa. The impugned order has overlooked the requirements of accounting standards which mandates that financials of the branch are to be included in the financials of the corporate entity that has established the branch. Such inclusions owing to accounting standards do not suffice to conclude that services were rendered by foreign service providers to the Indian headquarters. No effort has been undertaken by adjudicating Commissioner to ascertain the nature of the transactions for which payments were made by branch in Dubai and the demand in the impugned order lacks appropriate robustness in consequence.

11. Even if the payments are attributable to service rendered by foreign service providers to the appellant, the scope of

Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 needs ascertainment. We refer to our decision in re M/s. Tech Mahindra Ltd. wherein we have held that

'21. From the above, it is apparent that mere identification of a service and the legal fiction of separate establishment is not sufficient to tax the activities of the branch. The very existence of a branch presupposes some kind of activity that benefits the primary establishment in India and the organizational structure inherently prescribes allocation of financial resources by the primary establishment to the branch to enable undertaking of the prescribed activity. The books of accounts and statutory filings do not distinguish one from the other. The application of Finance Act, 1994 to such a business structure within India does not provide for a deemed segregation. Such a legal fiction in relation to overseas activities should, therefore, have a reason.

22. Section 66A of Finance Act, 1994 does not prescribe promulgation of any Rule for its administration. The two sets of Rules extracted supra are framed under the general provision in section 94 of Finance Act, 1994. Moreover, the Rules draw upon section 93 of Finance Act, 1994 in a manner akin to Export of Service Rules, 2005. It is noticed that the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 also mirrors the Export of Service Rules, 2005. That, however, cannot be taken as intent to tax the inflow of service merely because of a corresponding exemption accorded to the outflow of services. Reference to section 93 as an authority for prescribing the Rules would make it appear that the purpose of the said two sets Rules is to exclude from tax such services that do not fall within the three classifications predicated the import of service. The residuary provision in the Rules of 2006 make it clearly that such services have to be received by a recipient located in India for use in relation to business or commerce. The provisions of the successor Rules are no different.'

We note that Section 66A of Finance Act, 1994 is a special enabling provision engineered to tax import of services, both to countervail the taxing of domestic transactions and to afford a national treatment to the service, and the determination of taxability is with reference to the Rules supra. The Rules draw its origin also from the exemption powers devolving on the Central Government under Section 93 of Finance Act, 1994; accordingly, any situation that is not envisaged in the specific framework of taxability in Rule 3 is beyond the ambit of tax. The impugned order has erred in merely relying on the provisions of Section 66A(2) of Finance Act, 1994 and the non-exclusion of Section 65(105)(zzb) of Finance Act, 1994 from Rule 3 to conclude that tax liability arises.

12. We note that Rule 3(iii) of Taxation of Services (Provided from Outside India and Received in India), Rules 2006 includes 'business auxiliary services' but is restricted to such as are received by a recipient located in India for use in relation to business or commerce. The thrust of the Rules is to identify the manner of receipt of service in India in the three categories, viz. in relation to the object of the service, place of performance and location of the recipient. We are concerned with the residuary aspect of location of recipient. The adjudicating Commissioner has not rendered a finding that the appellant is the recipient of service, indeed, he could have done so only by examining the relationship between the appellant and branch in the context of the payments effected to foreign service provider which he, probably, did not feel obliged to in the absence of any allegation to that effect in the show cause notice. Unless the recipient is located in India, Section 66A cannot be invoked."

4.8 In view of the above discussions we do not find any merits in the findings recorded by the Commissioner in para 19.3, highlighting the reasons for payment of service tax, after acknowledging that the services were provided by the TTL, Korea to TDCV, Korea. Commissioner also do not dispute that the entire payment for the services provided by TTL Korea was

received by them directly from TDCV, Korea. Having acknowledged so Commissioner could not have come to the finding that these amounts were payment made by the appellant to TTL, Korea, for application of Rule 66 of the Finance Act, 1994.

4.9 Since in our view the impugned order cannot be sustained on this ground we are not recording any findings on the other grounds of classification of services and limitation etc.

4.10 Since the demand cannot be sustained, there cannot be any demand for interest or case for imposition of penalties on the appellant.

5.1 Appeal is allowed and impugned order is set aside.

(Order pronounced in the open court on 25.08.2022)

(Sanjiv Srivastava)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

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