

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

**SERVICE TAX APPEAL NO: 87277 OF 2017
AND
SERVICE TAX APPLICATION (EH) 85406 OF 2020
(on behalf of respondent)**

[Arising out of Order-in-Original No: PUN-SVTAX-000-COM-003-17-18 dated 29th May 2017 passed by the Commissioner of Service Tax, Pune.]

Persistent Systems Ltd
402E, Bhageerath, Senapati Bapat Road
Golkhalenagar, Pune – 411 016

... Appellant

versus

Commissioner of CGST
Pune – II
GST Bhavan, 41/A Sassoon Road, Pune - 411001

...Respondent

WITH

**SERVICE TAX APPEAL NO: 87420 OF 2017
AND
SERVICE TAX APPLICATION (EH) 85405 OF 2020
(on behalf of appellant)**

[Arising out of Order-in-Original No: PUN-SVTAX-000-COM-003-17-18 dated 29th May 2017 passed by the Commissioner of Service Tax, Pune.]

Commissioner of CGST
Pune – II
GST Bhavan, 41/A Sassoon Road, Pune - 411001

... Appellant

versus

Persistent Systems Ltd
402 E, Bhageerath, Senapati Bapat Road
Golkhalenagar, Pune – 411 016

...Respondent

APPEARANCE:

Shri Prakash Shah, Advocate for the assessee-appellant

Shri Anand Kumar, Additional Commissioner (AR) for Revenue

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 85052-85053 /2023

DATE OF HEARING: 28/07/2022
DATE OF DECISION: 25/01/2023

PER: C J MATHEW

M/s Persistent Systems Ltd and Revenue are in appeal against order-in-original no. PUN-SVTAX-000-COM-003-17-18 dated 29th May 2017 of Commissioner of Service Tax, Pune which disposed off show cause notice for recovery of tax of ₹45,21,49,333 for the period from 2011-12 to 2014-15 and, straddling, as it does, both the period before 1st July 2012 and after the 'negative list' regime came into force, under section 66A of Finance Act, 1994 as 'deemed recipient' of service and as service rendered in 'taxable territory' owing to operation of rule 3 of Place of Provision of Service Rules, 2012. The adjudicating authority held that the assessee had received service provided from outside India by its subsidiaries and, while upholding demand of ₹16,55,12,985 for 2014-15, against which assessee is in appeal, dropped recovery of ₹ 28,66,36,348 for the preceding years on ground of bar of limitation which is cause of grievance to the exchequer.

2. Proceedings were initiated against the appellant in the peculiar circumstances of the activities undertaken by them; they provide 'information technology and software services' to overseas customers which, admittedly, are considered as exports with no tax liability arising on the consideration thereof but six subsidiaries of theirs located outside India, in addition to seven branch offices, in addition to contracting with customers on their own, also undertake certain 'on-site' activities that constitute 'finishing touches' to the 'output service' rendered by the holding/principal to customers for which invoices raised on the appellant. For the period in dispute, the appellant had remitted ₹ 379,93,98,418.29 which, service tax authorities alleged to be consideration for 'support services business and commerce' rendered by the six subsidiary entities to the appellant and demanded tax that was only partly confirmed in the impugned proceedings.

3. According to Learned Authorised Representative, the invoices raised by the subsidiary entities and payment made by the appellant to them constitutes transaction for completion of the contracts of the appellant with its customers. It was also submitted that the demand is related only to such services rendered by the subsidiaries who also undertake independent contracting and have not been incorporated merely as adjuncts of the appellant; neither has the consideration obtained by these entities been subjected to proceedings for recovery

as that is, admittedly, services rendered by the subsidiary entities outside the country. He argued that the partial dropping of the computed liability by invoking the bar of limitation is not correct on facts as the appellant had, from 2012-13, altered the narration in the books of accounts from 'service received' to 'cost of technical professional' demonstrative of intention to mislead. Furthermore, he contends that the clear distinction between the work undertaken on behalf of the appellant and that undertaken by the subsidiaries on their own account was within the knowledge of the appellant. It was also argued that the decision of the Tribunal in *Board of Control for Cricket in India (BCCI) v. Commissioner of Service Tax-II, Mumbai [2018-TIOL-2641-CESTAT-MUM]* stands against the bar of limitation adopted by the adjudicating authority and submitted that the availability of credit is contingent only upon payment of tax by the assessee as 'deemed recipient' of service. It was pointed out by him that the decisions relied upon by the adjudicating authority had not taken note of the decision of a Larger Bench of the Tribunal in *Jay Yushin Ltd v. Commissioner of Central Excise, New Delhi [2000 (119) ELT 718 (Tribunal-LB)]* and, thus, lacks value as precedent. Submitting that section 66A of Finance Act, 1994 would be rendered otiose if 'person liable to pay tax' takes this plea, he sought setting aside of the dropping of demand in the impugned order.

4. Learned Counsel submits that the adjudicating authority,

despite having taken note of

‘24.3 Further, from the invoice no. PSI-PSL/IC/11-12/73021 dated 31-03-2012 issued by the subsidiary i.e. PSI to the noticee the description of the service provided is mentioned as "charges for software development services". The PSL has entered into same type of agreement and invoices with similar description of service rendered for charges for software development services have been issued by other subsidiaries. Accordingly payments of the consideration in foreign currency have been made by the noticee to the respective foreign subsidiaries.

24.4. Amongst others, the noticee in their defense submitted contract wise summary of onsite work under taken by their subsidiaries so as to substantiate classification of the services under management, maintenance or repair services. From the perusal of the same it is seen that subsidiaries are providing bundle of services in the field of software development which includes development, design, supports, validations, training, implementation, installation, enhancement, up gradation etc.... It is apparent that the every contract is for providing composite/bundled service and the same cannot be said only to be for providing management, maintenance or repair services. It could be seen that agreement also contains provisions for development, design etc. of the software.

24.5 As per the principles of classification of services laid down vide erstwhile Section 65A and now under Section 66F of the Act , where a service is capable of differential] treatment for any purpose based on its description, the most specific description shall preferred over a more general description. Further, even it is assumed that composite/ bundled services including management, maintenance or repair are being provided by the subsidiaries it would be

considered as "information technology software" which gives such bundle essential character for the reason that the agreement between PSL and subsidiaries coupled with the description of the services mentioned in the invoices are for providing software development services.

25. Another contention of the noticee is that Software in relation to which services performed are 'goods'. The noticee has relied on judgment of Apex Court in the case of TCS Vs State of Andhra Pradesh - [2004 (178) ELT 22 (SC)], in support of their contentions. They have also cited proviso to Rule 4(1) of POPS Rules 2012 which prescribes Place of Provision at the location of the goods at the time of provision of service when provided remotely by electronic means. From the fact of the case it is seen that subsidiaries only gets remote access for providing part of services at the place of customers of PSL. PSL engages foreign subsidiaries for rendering clusters of services onsite by remote access. The noticee is not having any proof as to how the software in respect of which subsidiaries provides services possesses attributes of goods as per TCS judgment. Moreover, service tax is levied on information technology software services w.e.f 16.05.2008 and in the negative list regime it is placed under declared list of service. The constitutional validity of IT software service has been upheld by Hon'ble Madras High Court in the case of InfoTech Software Dealers association - [2010(20) STR 289(MAD)] wherein it was emphasized that nature of transaction and imposition of tax would depend upon dominant intention of the contracting parties. Whether it is sale or service transaction therefore requires to be analyzed on the basis of end user licence agreement with end user of software. The High Court categorically held that if the software is sold through the medium of internet in that event, it is possible to hold that when access control is given

through an internet medium with username and password and when there is no CD or storage media for the item, it does not satisfy the requirement of being goods. The interchangeability of software from service to goods and vice versa therefore cannot be ruled out and it always depends upon intention of the contracting parties and mode of delivery of the software. The noticee in the instant case failed to substantiate/give documentary evidence to the effect that the software in relation to which onsite services are being provided by the subsidiaries possesses characteristics of the goods as settled in the judicial precedence cited above. In absence of the same it could be viewed only as argument based on the general statement that software are "goods" and the onsite services rendered by subsidiaries are performance based services performed on such goods made available by the recipient. Apparently the software accessed by the subsidiaries is neither in packaged form nor put in any media e.g. hard disk, CD etc. which can be sold off the shelf; therefore cannot to be said to have characteristics of goods unlike TCS judgment. Moreover, the subsidiaries gets remote access of the software for rendering services through internet or local area network medium; therefore no goods per se is made physically available by the recipient of service. In view of the above I hold that Rule 4(1) & proviso thereof of the POPS Rules 2012 is not applicable in the instant case as contended by the noticee.

26. Service Tax on "information technology software" is otherwise leviable on the basis of the location of the recipient in taxable territory [Rule 3 (iii) of Taxation of Services (Provided from outside India and received in India) Rules, 2006 till 30-06-2012, and thereafter in terms of Rule 3 of the Place of Provision of Service Rules 2012]. In the instant case the benefit of the service rendered onsite by the subsidiaries

accrued on PSL located in the taxable territory. PSL is legally entitled to receive the service and in turn makes payments in foreign currency to the subsidiaries. There is no agreement between subsidiaries and clients of PSL. Subsidiaries are not issuing any bills/invoices to such clients of PSL. Thus, it is PSL located in taxable territory who is the legal recipient of the service and therefore obliged to make payments for the onsite services rendered by their subsidiaries.'

in the impugned order went on to erroneously hold that

'28. In view of the above, I hold that "information technology software" services provided by the subsidiaries are received by the PSL in the taxable territory. I further hold that such taxable services received from outside India, is chargeable to Service Tax as per Section 66A of the Finance Act, 1994 read with Rule 3 (iii) of Taxation of Services (Provided from outside India and received in India) Rules, 2006 till 30-06-2012, and thereafter in terms of Section 66C of the Act ibid read with Rule 3 of the Place of Provision of Service Rules 2012. PSL being recipient of taxable service in India is the person liable for payment of Service Tax under RCM on the gross amount charged by such foreign subsidiaries in terms of Rule 2(l)(d)(iv) of Service Tax Rules, 1994 and Rule 2(l)(d)(i)(G) of the Rules ibid as these were in existence during the material time.'

and, in the process, has ignored law settled by the Tribunal in *3i Infotech Limited v. Commissioner of Service Tax, Mumbai-II* [2017 (1) TMI 437] and in *Genom Biotech Pvt Ltd v. Commissioner of Central Excise, Nashik* [2016 (42) STR 918].

5. It is further contended by him that the reliance placed by the adjudicating authority on the decision of the Tribunal in *Jet Airways India Ltd v. Commissioner of Central Excise, Mumbai* [2016-TIOL-2072-CESTAT-MUM] and other similar cases is sought to be challenged by Revenue solely by claiming precedence owing to some later decisions that took a different stand. He submitted that the decision in *Larsen & Toubro v. Commissioner of Central Excise, Pondicherry* [2008 (227) ELT 65], in *Motif India Infotech Private Limited v. Commissioner of Service Tax, Ahmedabad* [2015-TIOL-814-CESTAT] and in *Indus Theco Pvt Ltd v. Commissioner of Central Excise, Raigad* [2007 (212) ELT 85], pre-dating the decision in *re Jet Airways India Ltd*, reflect the consistent position of the Tribunal and had not been taken into account by the Tribunal in *re Board of Control for Cricket in India (BCCI)*.

6. As the adjudicating authority has held that tax is leviable, which assessee has challenged, but that limitation barred recovery beyond normal period, which is cavil of Revenue in its appeal, the entire issue needs to be looked into. We take up the legality of limiting the recovery to normal period first. Limitation is matter to be considered on facts and the assessee has not offered any justification for change in the accounting narration.

7. It is trite that show cause notice proposes recovery that claims

to be valid in accordance with specific provisions of the taxing statute and it is for the noticee to rely upon factual submissions and judicial decisions in its defence. The test of applicability of such decisions is not on record until raised in reply to notice; proceedings which accept such judgements as precedent may not necessarily have subjected the rigour of case law to contraindicated case law in the absence of rejoinder from tax authorities. Appeal is the first stage for countering the 'precedent value' and it has been placed on record by Learned Authorized Representative that contrary decisions are not only on similar facts but also that certain relevant judgments had not been considered in the decisions cited before the adjudicating authority by the assessee.

8. Considering this submission, it would be appropriate for the original authority to take a fresh look at the facts that have not been subjected to detailed scrutiny for proximity to the several decisions cited by both sides. As that would involve a reconsideration of a part of the show cause notice, it would also be appropriate to reconsider the submissions of the appellant-assessee on the levability of the tax in the light of decisions that were ignored by the adjudicating authority in the first instance.

9. Accordingly, we set aside the impugned order in its entirety and restore adjudication of show cause notice to the original authority with

the direction that the judicial decisions noted *supra* and other submissions, if any, be disposed off after detailed consideration. The Miscellaneous Applications stands disposed off.

(Order pronounced in the open court on 25/01/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*