(2021) 01 CESTAT CK 0024

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 20459 Of 2016

M/s Target Corporation India Pvt Ltd @Hash C.C.E.-Bangalore-iii

Date of Decision : 19-01-2021

Acts Referred:
Finance Act, 1994 — Section 65B(44), 65(68), 65(105)(k), 66A, 67, 68(2), 73(1), 75, 76, 77, 78
Service Tax Rules, 1994 — Rule 2(1)(d)(v), 6
Cenvat Credit Rules, 2004 — Rule 5Income Tax Act, 1961 — Section 195
Constitution Of India, 1950 — Article 366

Citation : (2021) 01 CESTAT CK 0024

Hon'ble Judges : S.S. Garg, J;P. Anjani kumar, Technical Member

Bench : Division Bench

Advocate : Ravi Raghavan, C.V. Savitha

Final Decision : Allowed

Judgement

SL.NO.,PARTICULARS,DETAILS

1.,Period in dispute,2008-2009 to 2011-2012

2.,Show Cause Notice,C.No. IV/16/333/2013 dated 23.10.2013

3.,Order-in-Original,SL No. BLR-EXCUS-003-COM-21-15-16 dated 23.12.2015

4.,Demand of Service Tax,"Rs.28,37,08,191/- under â??Manpower Recruitment or Supply

Agency Serviceâ??

5.,Interest,"Unquantified interest under Section 75 of the Finance

Act,1994

6.,Penalty,"i. Rs.28,37,08,191/-imposed under Section 78 of the Finance

Act, 1994;

ii. Rs. 10,000/- under Section 77 of the Finance Act, 1994;

7.,Service Tax deposited,"Rs.5,33,42,049/- Copy of the Challans dated 05.01.2013 is

enclosed as Annexure-A

8.,Interest Deposited,"Rs. 2,22,48,188 Copy of the Challans dated 05.01.2013 is

enclosed as Annexure-A

PERIOD,2007-2013,2008-2012

SERVICE TAX,"6,83,05,001","5,33,42,049

INTEREST,"2,83,85,571","2,22,48,188

TOTAL PAYMENTS,"9,66,90,572","7,55,90,237

e) Whenever the payment of interest under section 75 of the Finance Act, 1994 is mandated by the statute they automatically come into play when the",,

happening or non-happening of an event mentioned in the relevant section of the statute occurs. The liability gets extinguished only when the statutory,,

payments are made as required by the statute;,,

f) The Appellant has failed to disclose the correct value of taxable services to the department in their statutory ST-3 returns. The Appellants have,,

failed to pay the service tax on import of services under Section 66A of the Finance Act, 1994 with an intention to evade payment of taxes on the said",,

services. Therefore, invoking proviso to Section 73(1) of the Act is legally justified and merits confirmation. Hence the present appeal.",,

4. We have heard the learned Counsels for both the parties and perused the material on record and the decisions relied upon by the appellant.,,

5. Learned Counsel for the appellants submitted that the impugned order is not sustainable in law as the same has been passed without properly,,

appreciating the facts and the law. Learned Counsel referred to the various clauses of the agreement between the appellant and its group companies,,

which are basically for provision of certain specialized services and are not related to supply of manpower which is evident from various clauses in the,,

agreement. He further submitted that the employees seconded to India are required to report to the officers of the appellant and such employees are,,

accountable for their performance to the appellant. He also submitted that an employer-employee relationship comes into existence between the,,

appellant and the employees seconded by the group companies abroad and the arrangement will not fall under the taxable service of â??manpower,, recruitment or supply agency serviceâ?? as defined under Section 65(68) of the Finance Act, 1994. He also submitted that the seconded employees",,

are in fact the employees of the appellant and the appellant issues Form-16 to the employees who filed their income tax return in India and the,,

appellant also deposited provident fund on behalf of such employees. He further submitted that the persons seconded to the appellant work in the,,

capacity of employees and payment of salaries etc is made to such employees by group companies only for disbursement purposes and therefore, the",,

employer employee relationship exists and such an activity cannot be termed as â??manpower recruitment or supply agencyâ?? service. He also,,

submitted that there is no service provider/recipient relationship in the present case as required by Section 65(105)(k) since an employer-employee,,

relationship is created between the appellant and the staff supplied. He also submitted that the disbursement of salary cannot determine the nature of,,

the transaction and the intention of the parties to the arrangement is to merely transfer employees to the appellant based on request and not to act as,,

supplier of manpower. The learned Counsel also referred the terms of employment agreement with some of the employees indicating their duration of,,

work, compensation and employee benefit plans etc. He further submitted that there is no consideration for the alleged taxable service except",,

payment of service charged @ 15 dollar per employee per pay role cycle for processing the pay role of the seconded employees. He also submitted,,

that there is no consideration charged by Target USA on the appellant for providing the supply of manpower as alleged by the Department and,,

confirmed by the impugned order. All the payments made by the appellant to Target USA is only a reimbursement of salaries and other benefits,,

relatable to the seconded employees hence the value of taxable service of manpower supply is Nil. He further submitted that Target USA at the most,,

maybe considered as pure agent in the event taxable service of supply of manpower is held to be provided. He also submitted that the appellants are,,

not bound by the ruling of authority for advance ruling of income tax in respect of service tax. He also submitted that the computation of liability is,,

incorrect as the appellants have made payment of service tax along with interest on their own account and subsequently took the credit and thereafter,,

got the refund under Rule 5 of CCR and the said refund was sanctioned in toto. He also submitted that there is not suppression of facts and everything,, was disclosed in the financial accounts and hence extended period of limitation cannot be invoked and penalties cannot be imposed. Learned Counsel,,

further submitted that the identical issue involved in the present case has been considered by various Benches of the Tribunal and has decided in,,

favour of the assessee and he cited upon the following decisions: Â,,

Â· Honeywell Technology Solutions Lab Pvt. Ltd. Vs CST, Bangalore, 2020-TIOL-1277-CESTAT-BANG.",,

Â· Volkaswagen India (Pvt.) Ltd Vs CCE, Pune-I, 2014 (34) STR 135 (Tri. Mumbai) maintained in 2016 (42) STR J145 (SC).",,

Â· Paramount Communication Ltd. Vs CCE, Jaipur, 2017 (47) STR 371 (Tri. Del.) Â",,

Â· CST Vs Arvind Mills Ltd., 2014-TIOL-441-HC-AHM-ST.",,

Â· CCE Vs Computer Science Corporation India Pvt. Ltd., 2015 (37) STR 62 (All.) Â",,

Â· Spirax Marshall P. Ltd. Vs CCE, Pune-I, 2016 (44) STR 310 (Tri. Mum) maintained in 2016 (44) STR J153 (SC). Â",,

Â· Nissin Brake India Pvt. Ltd. Vs CCE, Jaipur-I, 2019 (24) GSTL 563 (Tri. Del.) Â",,

Â· Nektar Therapeutics India Pvt. Ltd. Vs CCE, Hyderabad, 2020-VIL-546-CESTAT-HYD-ST. Â",,

Â· Mikuni India Pvt. Ltd. Vs Commissioner of CGST, Rajasthan, 2019- TIOL-3188-CESTAT-DEL.",,

Â· India Yamaha Motor Pvt. Ltd. Vs CCE, New Delhi, 2019-TIOL-3675- CESTAT-DEL.",,

5.1 He further submitted that as per the agreement between the appellant and group companies, Target USA, the appellant shall pay Target USA a",,

service charge @ 15 dollar per employee per pay role cycle for processing pay role of the seconded employees which cannot be termed as,,

consideration for providing manpower recruitment or manpower supply agency service. He also submitted that foreign company deputing the,,

employees may be considered as pure agent and foreign agency which is involved in manpower recruitment or supply agency, contractual",,

responsibility can only be recruiting the people or supply people and therefore these companies cannot be described as engaged in providing any,,

service, directly or indirectly, for recruitment or supply of manpower.",,

6. On the other hand, learned AR reiterated the findings of the impugned order. She further submitted that as per the agreement between the appellant",,

and foreign entity, i.e. their counterpart in the USA, the appellant is liable to service tax @ 15 dollar per employee per pay role cycle for processing",,

the pay role of the seconded employees which is nothing but supply of manpower service and hence the impugned order has rightly confirmed the,,

demand.,,

7. After considering the submissions of both the parties and perusal of the material on record as well as perusal of the various decisions relied upon by,,

the appellant cited supra, we think that before we answer the question involved in the present case, it is pertinent to examine and analyse the relevant",,

definitions involved in the present case which are reproduced herein below:,,

Section 65 â?" definitions â?",,

(105) â??taxable serviceâ?? means any service provided or to be provided, -",,

(k)to any person, by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or",,

otherwise, in any manner;",,

Explanation. â?" For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, recruitment or supply of",,

manpower includes services in relation to pre-recruitment screening, verification of the credentials and antecedents of the candidate and",,

authenticity of documents submitted by the candidate;,,

7.1. Further, we note that the scope of â??Manpower Recruitment or Supply Agencyâ?? service has been explained by Circular F.No. B1/6/2005-",,

TRU dated 27.07.2005 as follows:,,

22.3 In these cases, the individuals are generally contractually employed by the manpower supplier. The supplier agrees for use of the",,

services of an individual employed by him to another person for a consideration. The terms of the individualâ??s employment may be laid,,

down in a formal contract or letter of appointment or on a less formal basis. What is relevant is that the staff are not contractually employed,,

by the recipient but come under his direction.â??,,

7.2. Further, for the period post July 2012, the nomenclature bases classification of service tax was done away with and â??serviceâ?? was",, specifically defined under Section 65B(44) of the Finance Act, 1994. Clause 44 of Section 65B read as:",,

(44) â??serviceâ? means any activity carried out by a person for another for consideration, and includes a declared service, but shall not",,

includeâ?",,

(a) an activity which constitutes merely,â?"",,

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or",,

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the",,

Constitution; or,,

(iii) a transaction in money or actionable claim;,,

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;,,

(c) fees taken in any Court or tribunal established under any law for the time being in force.,,

7.3. Further, after examining the various definitions cited supra, we find that in order to classify any service under the manpower recruitment or supply",,

agency service the following conditions need to be satisfied:,,

i. The agency must be any person,,

ii. It must be engaged in providing a specified service,,

iii. The specified service is recruitment or supply of manpower,,

iv. The service can be provided â??temporarily or otherwiseâ??,,

v. The service may be provided directly or indirectly vi. The service may be provided in any manner,,

vii. The service must be provided to any other person,,

7.4. Further, we find that the definition of â??Manpower Recruitment or Supply Agencyâ? seeks to bring under its ambit, two types of activities i.e.",,

recruitment of manpower and supply of manpower and further the service becomes the taxable service only if provided by a manpower recruitment or,,

supply agency but in the present case, we are concerned only with the supply of manpower. Further, we find that post July 2012, the definition of",,

service specifically incorporated seeks to exclude certain transactions from the ambit of service and provision of service by an employee to the,, employer in the course of or in relation to his employment stands excluded from the definition of service. We also note that the legal position post,,

negative list regime does not make any departure from the settled position of law as existed before 2012 with respect to the service tax implications on,,

deputation of employees. In fact, the above exclusion in the definition of service amplifies the position of law to keep employees providing service to",,

the employer in the course of their employment out of the purview of service tax. We have also examined the agreements entered into by the,,

appellant with a group company which are specifically for provision of certain specialized services and are not related to â??supply of manpowerâ??,,

which is evident from various clauses in the Agreements and we also find that group companies are not in the business of supplying manpower.,,

Further, we find that the persons seconded to the appellant working in the capacity of employees and payment of salaries etc is made to such",,

employees by group companies only for disbursement purposes and hence employee-employer relationship exist and such an activity cannot be termed,,

as â??manpower recruitment or supply agencyâ? and the whole arrangement between the appellant and its group companies does not fall under the,,

taxable service of manpower recruitment or supply agency service as defined under the Finance Act, 1994. We also find that there is no service",,

provider-recipient relationship in the present case, as required by Section 65(105)(k). This issue is no more res integra and has been settled by various",,

decisions of the Tribunals and the High Courts and upheld by the Honâ??ble Apex Court. We may refer to few of the decisions, in the case of",,

Honeywell Technology Solutions Pvt. Ltd. Vs CST, Bangalore, 2020-TIOL-1277-CESTAT-BANG wherein recently this Tribunal based on identical",,

set of facts set aside the demand in as much as there was a distinct employee-employer relationship between the seconded employee and the,,

assessee. We also hold that method of disbursement of salary cannot determine the nature of the transaction and this issue was considered in the case,,

of M/s. Volkswagen India Pvt. Ltd. v. CCE, Pune-I reported in 2014 (34) S.T.R. 135 (Tri. - Mumbai) which has been upheld by the Honâ??ble",,

Apex Court in the case of Commissioner Vs Volkswagen India (Pvt.) Ltd. - 2016 (42) S.T.R. J145 (S.C.). We also find that in the case of Computer,,

Sciences Corporation India Pvt. Ltd. v. Commissioner of Service Tax, Noida reported in 2014-TIOL-434-CESTAT DEL as affirmed by",, Commissioner of Central Excise v. M/s Computer Science Corporation India Pvt. Ltd. 2015 (37) S.T.R. 62 (All.) wherein the facts of the case were,,

similar to the present case. The Honâ??ble High Court of Allahabad has dealt with the said issue and has held as under:,,

â??8. In the present case, the Commissioner clearly missed the requirement that the service which is provided or to be provided, must be by",,

a manpower recruitment or supply agency. Moreover, such a service has to be in relation to the supply of manpower. The assessee obtained",,

from its group companies directly or by transfer of the employees, the services of expatriate employees. The assessee paid the salaries of the",,

employees in India, deducted tax and contributed to statutory social security benefits such as provident fund. The assessee was also",,

required to remit contributions, which had to be paid towards social security and other benefits that were payable to the account of the",,

employees under the laws of the foreign jurisdiction. There was no basis whatsoever to hold that in such a transaction, a taxable service",,

involving the recruitment or supply of manpower was provided by a manpower recruitment or supply agency. Unless the critical,,

requirements of clause (k) of Section 65(105) are fulfilled, the element of taxability would not arise.â??",,

8. Further, the Honâ??ble High Court of Gujarat in the case of Commissioner of Service Tax Vs Arvind Mills Ltd, 2014(35) STR 496=2014- TIOL-",,

441-HC-AHM-ST has held that even if the actual cost incurred by appellant in terms of salary remuneration and perquisites is only reimbursed by,,

group of companies, there remains no element of profit or finance benefit. The arrangement is that of the continuous control and the direction of the",,

company to whom the holding company has deputed the employee, such an arrangement is out of the ambit to be called manpower supply service.",,

This Tribunal also in an identical case decided by Final Order No. 70436/2019 dated11.10.2019 by relying upon the case of Volkswagen India Pvt.,,

Ltd. Vs. CCE, Pune-I -2014 (34) STR 135(Tri.-Mumbai) and the above discussed case law has held that the expatriates working under the assessee",,

are the employees of the assessee as there is an employeremployee relationship. As such, there is no supply of manpower service which is rendered",,

to the appellant by the foreign/holding company. Further, in the case of M/s India Yamaha Motor (supra) the Division Bench of this Tribunal by",, relying upon the decision of Computer Science Corporation India Pvt. Ltd and CST Vs Arvind Mills Ltd came to the conclusion that in the case of,,

seconded employees, service tax is not leviable under the category of manpower recruitment or supply of manpower service. Further, the Division",,

Bench of this Tribunal recently in the case of Northern Operating Services Pvt. Ltd. Vide Final Order No. 20852-20854/2020 dated 23.12.2020 has,,

allowed the appeal of the assessee and set aside the demand raised by the Department under the category of manpower recruitment or supply agency,,

service. Further, the charge of service tax @ 15 dollar per employee per pay role cycle for processing pay role of the seconded employee by the",,

Target USA cannot fall under the category of manpower recruitment or supply of manpower agency service as per the definition provided in Section,,

65(68) of the Finance Act, 1994. Further, we also hold that the ruling given by advance ruling authority was under the Income Tax Act, 1961 and the",,

said ruling is not having any binding precedent under the Service Tax Laws. We also note that in the advance authority ruling, there is no finding to the",,

extent of pay role processing.,,

9. In view of our discussion above and by following the ratio of the various decisions cited supra, we are of the considered view that the impugned",,

order is not sustainable in law and hence we set aside the same by allowing the appeal of the appellant.,,

(Order pronounced in the open court on 19/01/2021),,