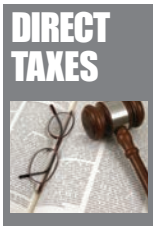
Legal Decisions[1]



Service Tax

LD/64/132

Shapoorji Pallonji And Company Pvt. Ltd.

vs.

CST, Patna

3rd March, 2016 (PAT)

Term 'Governmental Authority' defined.

Assessee was awarded a contract by National Building Construction Corporation Limited (NBCCL) to construct an academic building project at IIT, Patna. Assessee filed writ petition before the High Court challenging the levy of service tax on the said construction activity on the ground that the said activity is exempted from levy of service tax.

The High Court, analysing the provisions of the entry 12 of Notification No. 25/2012 ST dated 20.06.2012 read with the definition of 'Governmental Authority', held that the service provided by the assessee is exempt from service tax in terms of the above referred notification.

While analysing the definition of the phrase 'Governmental Authority', as substituted *vide* Notification dated 30.1.2014, the Court held that in terms of the definition, any authority or board or any other body set up by an Act of Parliament or State Legislature is a Governmental Authority. The conditions of 90% or more participation by way of equity or control to carry out any function entrusted to a municipality under Article 243W of the Constitution as set out in the end of the definition is not applicable to such entities. Therefore, IIT being an entity set up by an Act of Parliament i.e. Indian Institutes of Technology Act, 1961 (59 of 1961) as an institute of national importance under Article 248 of the Constitution of India read with 7th Schedule List I, qualifies to be Governmental authority and is eligible for exemption.

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LD/64/133

M/s Tech Mahindra Ltd.

vs.

CCE

3rd March, 2016 (MUM)

Amount paid towards reimbursements of costs by Indian company to its branch abroad is not liable to service tax.

The appellant has established a network of branches and subsidiary companies at different locations outside the country. The branches of the appellant act as salary disbursers of the staff deputed from India to client locations besides carrying out other assigned activities. The salaries so disbursed, as well as other expenses of running the branch, are met from the coffers of the appellant. Payments made by customers are also received in branches and transmitted to the head office after netting the expenses incurred by the branch. Revenue initiated proceedings and also confirmed the demand service tax on the payments made by the appellant to branch by entertaining a view that the branches are rendering services to its head office in India.

On appeal, the Tribunal set aside the demand of service tax on the basis of the following findings:

- Section 66A(2) which provides that the branch outside India is permanent establishment in such territory, cannot be interpreted to mean the branch and the head office as two commercial entities.
- A branch, by its very nature, cannot survive without resources assigned by the head office. The activity of the head office and branch are thus inextricably enmeshed. The employees of the branch are without doubt, the employees of the company.
- Merely because there is a branch and that branch has, in some way, contributed to the activities of the appellant-assessee in discharging its contractual obligations, the definition of 'business auxiliary service' in section 65(19) of Finance Act, 1994 may not apply.
- Transfer of funds to the branch is nothing but reimbursement and taxing of such reimbursement would amount to taxing of transfer of funds which is not contemplated by Finance Act, 1994.

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LD/64/134

Reliance ADA Group P. Ltd.

vs.

Commissioner of Service Tax, Mumbai IV

18th February 2016 (MUM)

[1] *Contributed by CA. Sahil Garud, CA. V. Raghuraman, Indirect Taxes Committee and ICAI's Editorial Board Secretariat.*
Readers are invited to send their comments on the selection of cases and their utility at eboard@icai.in. For full judgment, write to eboard@icai.in

Legal Update

Section 65(104c) of Finance Act: Definition of business support service

Activity of procuring services on behalf of Participating Group Cos. under 'cost sharing arrangement' not held to be taxable as Business Support Services u/s 65(104c) r/w 65(105)(zzzq) of Finance Act; Assessee held to be 'Pure Agent' in terms of Rule 5(2) of Valuation Rules and entire matter viewed as revenue neutral in view of availability of CENVAT credit thereon to Group Cos.

The issue before Mumbai CESTAT was whether activities of procuring goods & services on behalf of Participating Group Cos. on cost sharing basis, would be taxable as Business Support Services u/s 65(104c) r/w 65(105)(zzzq) of Finance Act for FY 06-07 and 07-08.

The assessee is a Guarantee company u/s 27 of the Companies Act 1956, which had entered into contractual agreements with its participating group cos. to procure certain services on their behalf. This was a mere cost sharing arrangement, and the role of assessee was limited to monitoring and coordinating the arrangement for all participants. Such procurement *inter alia* included Aircraft Hiring Services, Branding Services, Professional Services, and Custodian Services *etc.* The expenses/ cost incurred by assessee in procuring the specified services was separately charged to and reimbursed by the Participating Group companies. The allocation of cost was based on estimated usage of such procured services by each member of the Participating Group companies.

An EA 2000 Service tax audit for the period 2006-07 to 2009-10 was conducted on the assessee. Revenue observed that assessee had provided business support service to its various Participating Group companies by way of accounting and processing of certain transactions and providing operational assistance as required by these companies. As per the agreements, the participating group cos. would jointly pay fixed fee of ₹1 Cr p.a. as remuneration to assessee for acting as Manager and carrying out activities envisaged under the agreements. It was also observed that assessee had classified these services as business support service, and paying service tax from 2008-09 onwards. According to Revenue, assessee had provided similar services in FY 2006-07 and 2007-08 for amounts of ₹33.01 Cr (approx.) and ₹113 Cr (approx.) respectively, and had neither taken registration nor discharged service tax liability u/s 65(104c) r/w 65(105)(zzzq) of Finance Act.

The assessee submitted that it runs on No profit-No loss basis and only recovered cost from Participating Group Cos., and was acting as pure agent. Moreover, it did not hold any title to the goods and services procured on behalf of said Cos. Also, assessee stated that the fixed remuneration of ₹1 Cr even if assumed to be received, would alone be liable to service tax. Assessee stated that the arrangement had been accepted by Income Tax Authorities who had not considered the recoveries from Participating Group Cos. as income of assessee nor considered the amounts paid to various service providers as expenditure.

A show cause notice was issued proposing tax demand of ₹15.14 Cr plus interest and penalty u/s 76, 77 and 78, under the category of Business Support Service.

The assessee stated that since a new service category, viz. 'Supply of Tangible Goods Services' was introduced w.e.f. May 2008, and that majority of reimbursements pertained to Aircraft Expenses, assessee under an abundant caution applied for registration and started discharging service tax from 2008 onwards. Assessee stated that the cost sharing arrangement could not be covered under the broader category of BSS as its definition had limited application to the words and phrases used therein; it could not be simply extended to all the services. Section 74 of the Finance Act, 2011 had expanded the definition of BSS to include 'operational or administrative assistance in any manner' w.e.f. 01/05/2011 prospectively. Even if cost sharing was held to be taxable prior to 01/05/2011, value for the purpose of levying tax would be the gross amount charged by service provider for services rendered or to be rendered.

The Adjudicating Authority confirmed the demand, with interest and penalty. Against this, assessee approached CESTAT.

CESTAT perused the definition of business support service u/s 65(104c). It observed that admittedly, the objective of assessee-company as per the MoA was to promote, manage, administer, counsel or otherwise assist in the growth and operation of the Group Cos. The same is achieved by entering into cost sharing agreement with Participating Group Cos. The services were provided by third parties and/or employees of assessee so that cost thereof could be shared. Assessee did not provide any services to such Group Cos. except coordinating

and monitoring the cost sharing arrangement. The Agreements specified appointment of assessee as a Trustee or Manager to obtain, hold and manage the resources required for jointly carrying out the activities. The Participating Group Cos. would share the cost of obtaining and employing resources in relation to specified activities.

Assessee only carried out only agency function of procurement of services for Participating Group Cos. which shared the costs and expenses thereon. The reimbursements of cost/expenses incurred by assessee could not be regarded as consideration towards taxable services provided by it. CESTAT stated that *"Service tax is a levy on rendition of taxable service..... in the peculiar facts of the instant case, the Appellant is merely acting as a manager/trustee to incur expenses on behalf of the Participating Group Companies. The object of entering into such cost sharing arrangement is to reduce the cost of operation of the Participating Group Companies.."* Therefore, in the absence of rendition of taxable service by assessee to the Participating Group Cos., the demand of service tax could not sustain, concluded CESTAT.

CESTAT observed that Adjudicating Authority's finding was not supported by any documentary evidence, and had erroneously held that activities fall u/s 65(104c) r/w Sec 65(105)(zzzq). Assessee merely acted as an agency to procure services and allocate cost to various Group Cos. for which it could claim an amount of ₹1 Cr. jointly from all the Cos. as its fees in addition to reimbursement of total costs incurred. CESTAT stated that no direct statutory provision or any binding precedent had been shown by Revenue which for the relevant time, which covered the activity of incurring costs and seeking reimbursements as under Business Support Service. There was no dispute that no additional fees or profits or consideration for Pure Agent Services had been received by assessee, who had merely recovered actual costs incurred.

Business Support Service covered only specific activities in its inclusive part. Assessee had not provided any of these specified activities. CESTAT observed that activity of incurring cost as service is not in the nature of outsourced activity as contemplated in the definition of Business Support Services and therefore would not be taxable under the category of 'Business Support Services'. In *JM Financial Services Pvt. Ltd. vs. Commissioner of Services Tax* [2014 (36) STR 151], the Tribunal held

that such reimbursement of expenses so recovered by the assessee is not chargeable to Service tax.

CESTAT also observed that the amendment w.e.f. May 1, 2011 enhancing the scope of BSS *vide* insertion of words "operational or administrative assistance in any manner" was only prospective in operation. Therefore, any such assistance prior to said date could not be considered as taxable within the scope of Section 65(104c) r/w 65(105)(zzzq) of Finance Act.

Rule 5(2) does not stipulate any condition as to one on one identification of service recipient and service provider in order to fall within the ambit of 'Pure Agent', observed CESTAT. The pre-requisite is that the expenses should have been incurred by the person on behalf of service recipient and the expenses so incurred should be reimbursed to him on actual basis.

Further, even if the activities carried out by assessee were subjected to service tax, the whole scenario would be Revenue neutral since the Participating Group Cos. were discharging Service tax on their activities and would be entitled to avail the CENVAT Credit. In case of *CC Ex vs. Reclamation Welding Ltd.* [2014 308 ELT 542], it was held by coordinate bench that when recipient of same group company is eligible to avail CENVAT credit of duty paid by the assessee, the assessee could not be alleged to have mala fide intent to evade payment of duty and accordingly extended period of limitation cannot be invoked.

Thus, CESTAT allowed assessee's appeal with consequential relief and set aside the order-in-original. ■