CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 20459 of 2016

[Arising out of Order-in-Original No. BLR-EXCUS-003-COM-21-15-16 dated 23/12/2015 passed by Commissioner of Central Excise, BANGALORE-III]

M/s Target Corporation India Pvt Ltd
C2 Block, Manyata Embassy Business Park-Sez Unit, Outer Ring Road, Nagawara Hobli Hebaal,
BANGALORE
KARNATAKA
560045

Appellant(s)

VERSUS

C.C.E.-Bangalore-iii
PB.NO.5400...QUEENS ROAD,
CENTRAL REVENUES BUILDING,
BANGALORE,
KARNATAKA
560001

Respondent(s)

APPEARANCE:

Shri Ravi Raghavan, Advocate for the Appellant
Smt. C.V. Savitha, Authorized Representative for the Respondent

Date of Hearing: 17/12/2020
Date of Decision:19/01/2021

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No.20008 /2021

Per : S.S GARG

The present appeal is directed against the impugned order dated 10.12.2015/23.12.2015 passed by the Commissioner of Central Excise, Bangalore whereby the Commissioner has confirmed the demand along with

interest and penalties. The details of the case are given herein below in tabular form:

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 'Manpower Recruitment or Supply Agency Service'
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

2. Briefly the facts of the present case are that the appellants are engaged in providing software development and IT enabled services and are registered with Service Tax Commissionerate, Bangalore for payment of service tax under the categories of 'Information Technology Software Service', 'Business Auxiliary Service', 'Business Support Service' and 'Consulting Engineer Service'. Further, on gathering intelligence and subsequent examination of balance sheet of the assessee, the Department found that the assessee has incurred sizeable expenditure in foreign currency towards import of services but no service tax amount has been paid. After investigation, Department entertained the view that the assessee has evaded the payment of service tax on 'Manpower Recruitment and Supply of Manpower Agency Service'. The case of the appellant is that they have entered into an agreement with the M/s Target Corporation, USA for secondment of employees w.e.f. 01.04.2006 and apart from the agreement, the appellants have also issued a letter of assignment to the seconded employee specifying the location of work, position of duties, hours of work, computation of employee benefits, terms of employment, annual revision,

termination of employment and taxation etc. relevant to their secondment with the appellant. It is pertinent to know the relevant terms of the agreement to understand the transaction and the nature of activity which are as follows:

i. The Appellant desires to secure the services of personnel to assist them in their business for which the Appellants requested Target, USA to second certain of its employees having required level of expertise to the Appellants.
ii. Target, USA has agreed to second certain employees to the Appellant for other good and value consideration.
iii. The Appellant shall provide Target, USA with a description of the job and qualifications required by them. Target, USA shall identify and select the employees to be seconded to the Appellant with their approval and the Appellant can reject the employees so selected by Target, USA at any stage during the selection process.
iv. The employees seconded to the Appellant shall continue to have their payroll processed by Target, USA. The Appellant shall also pay Target, USA a service charge @$15 per employee per payroll cycle for processing the payroll of the seconded employees.
v. The employee shall act in accordance with the instructions and directions of the Appellants and shall be reportable and responsible to the Appellant.
vi. During the secondment period, the Appellant shall reimburse Target, USA for the following amounts (collectively 'reimbursable expenses')
    a) All remuneration of the Employees, including but not limited to salary, incentives and employment benefits for the employees paid by Target, USA; and
    b) All official out of pocket expenses incurred by the seconded Employees and reimbursed by Target, USA, including but not limited to business travel expenses and other miscellaneous expenses, directly related to the secondment of the employees.
vii. It is specifically agreed that the payments made by the

Appellants to Target, USA shall be limited to actual costs incurred; the parties agree that during the Secondment period, the role of Target, USA is restricted to that of payroll service provider only.

viii. Target, USA shall furnish the Appellants periodic statement detailing the reimbursable expenses due to the Target, USA with respect to the employees. Each statement shall include a debit note denominated in US dollars and that shall meet all of the Appellants requirements for payments as instructed by the Appellant.

ix. The seconded employees will be subject to taxation in India based on applicable taxation laws. The Appellants shall ensure that all reasonable measures are taken with respect to full compliance of the India Tax obligations of the Employees.

3. Further, as per the appellant, Target, USA have raised debit notes on the appellants towards salaries paid to the employees seconded from Target, USA and the appellants have remitted the amount in foreign currency and disclosures were made in their financial statement based on relevant accounting standards and guidance notes issued by the Institute of Chartered Accountants of India. Further, as per the appellant, the payments to expats are grouped and included as 'salaries, wages and bonus' under the head 'expenditure incurred in foreign exchange' and the same is also shown as 'reimbursement of expenses' under related party transaction as they form part of the transactions within the group entities. It is further alleged by the appellants that the total amount appearing in the notes to accounts as expenditure in foreign exchange under 'salaries, wages and bonus' included payment made by the appellants to its Indian employees who work in the USA at overseas projects and such payments are directly made to the said employees into the accounts of the employees in USA and the same is not subject to service tax in India. Further, the appellant in order to avoid any future litigation approached the authority for advance ruling (Income Tax, New Delhi) seeking advance rulings on the following questions:

Secondment charge:

(I) Whether on the facts and circumstances of the case, the amount reimbursed or reimbursable by the applicant to Target Corporation, USA under the terms of the secondment agreement dated 10.6.2007 is in the nature of income accruing to Target USA in respect of which, tax is liable to be deducted at source by the applicant under the provisions of Income Tax Act, 1961?

(II) If the answer to the first question is in affirmative, what is the rate at which tax is required to be deducted at source by the applicant?

Payroll processing charge:

(I) On the facts and in the circumstances of the case whether the payment proposed to be made by the applicant towards payroll processing charges is taxable as per the provisions of Double Taxation Avoidance Agreement ('DTAA") entered into between India and USA?

(II) On the facts and circumstance of the case whether the applicant is liable to withhold tax at source under Section 195 of the Act on the payments proposed to be made by the applicant towards payroll processing charges?

3.1 On both these questions, the Hon'ble Authority through their Ruling answered as follows:

Secondment Charges:

a. Payment received by Target, the US Principal from the Applicant is income in the hands of Target and while paying the amounts, the Applicant has the obligation to withhold taxes under Section 195 of the Act.
b. The Applicant does not become the employer of the seconded employees and what is paid by the Applicant to the US Principal would not be reimbursement of salary but fees for

technical services, depending on a finding on that question.

c. The deduction of tax has to be at the rate prescribed by the Act.

Payroll processing charges:

a. Neither the agreements nor the application, specified what duties are to be performed by the seconded employees in India. Adequate details were also not available on the persons seconded or about the roles they have to perform in India. It was held that it would not be proper and just to render a ruling on the nature of the employees in respect of whom processing charges are collected by the US Principal.

3.2 As per the appellant, they were not satisfied with the advance authority ruling but to avoid further litigation and mounting interest in case of any liability, the appellants on their own account, calculated the service tax liability on the salaries etc. relating to the expats for the period 2007-2008 to 2012-2013 and paid service tax with interest under protest as follows:

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**

3.3 Subsequently, after payment of service tax the appellant availed credit of service tax and claimed refund of the said amount in terms of Rule 5 of CCR, 2004. The said refund was sanctioned in toto by the Deputy Commissioner, Bangalore vide OIO No. 24-25/2020-21 dated 06.06.2020. Further, on completion of the investigation by the Department, the Department issued a SCN dated 23.10.2013 proposing to demand differential service tax amounting to Rs.28,37,08,191/- alleged to not have been paid as recipient of services for having imported manpower recruitment or supply agency services from the persons located outside India for the

period 2008-2009 to 2011-2012 along with interest and penalty under Section 76,77,78. The appellant filed a detailed reply dated 02.01.2014 and 25.02.2014 rebutting all the allegations of the SCN. After following the due process, the learned Commissioner passed the impugned Order-in-Original No. BLR-EXCUS-0003-COM-21-15-16 dated 10.12.2015/23.12.2015 confirming the demand by disregarding all the submissions made by the appellants. It is pertinent to note that the confirmation of demand by the Commissioner is broadly based on the following grounds:

a) The foreign currency expenditure incurred under the heads 'salaries, wages and bonus', 'reimbursement of expenses', 'import of services and reimbursement of expenses' are considered as taxable value on import of Manpower recruitment or supply agency services;
b) The fact with regard to payments made by the Company to its employees who work in USA at overseas projects, was not disclosed by the Appellant either in their replies or during the recording of statement, though the investigating officers have distinctively requested to explain the nature of foreign expenditure indicated under the head 'salary, wages and bonus';
c) The Appellant has short paid service tax to the extent of Rs. 28,37,08,191/- on taxable value incurred in foreign currency towards import of 'manpower recruitment or supply agency service' during the period 2008-2009 to 2011-2012;
d) Under valuation on the value of the taxable service received is established in the instant case and the Appellants have contravened the provisions of Section 66A, Section 67 and Section 68(2) of the Finance Act, 1994 read with Rule 2(1)(d)(v) and Rule 6 of the Service Tax Rules, 1994;
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 'manpower recruitment or supply agency service' 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 'manpower recruitment or supply agency' 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:

- *Honeywell Technology Solutions Lab Pvt. Ltd. Vs CST, Bangalore, 2020-TIOL-1277-CESTAT-BANG.*
- *Volkaswagen India (Pvt.) Ltd Vs CCE, Pune-I, 2014 (34) STR 135 (Tri. Mumbai) maintained in 2016 (42) STR J145 (SC).*

- *Paramount Communication Ltd. Vs CCE, Jaipur, 2017 (47) STR 371 (Tri. Del.)*
- *CST Vs Arvind Mills Ltd., 2014-TIOL-441-HC-AHM-ST.*
- *CCE Vs Computer Science Corporation India Pvt. Ltd., 2015 (37) STR 62 (All.)*
- *Spirax Marshall P. Ltd. Vs CCE, Pune-I, 2016 (44) STR 310 (Tri. Mum) maintained in 2016 (44) STR J153 (SC).*
- *Nissin Brake India Pvt. Ltd. Vs CCE, Jaipur-I, 2019 (24) GSTL 563 (Tri. Del.)*
- *Nektar Therapeutics India Pvt. Ltd. Vs CCE, Hyderabad, 2020-VIL-546-CESTAT-HYD-ST.*
- *Mikuni India Pvt. Ltd. Vs Commissioner of CGST, Rajasthan, 2019-TIOL-3188-CESTAT-DEL.*
- *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 – definitions -*
>
> *(105) "taxable service" 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.*** *— 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 'Manpower Recruitment or Supply Agency' 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 individual'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."*

7.2. Further, for the period post July 2012, the nomenclature bases

classification of service tax was done away with and 'service' was specifically defined under Section 65B (44) of the Finance Act, 1994. Clause 44 of Section 65B read as:

> *(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*
> *(a) an activity which constitutes merely,—*
> *(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 'temporarily or otherwise'
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 "Manpower Recruitment or Supply Agency" 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 'supply of manpower' 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 "manpower recruitment or supply agency" 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 Hon'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 Hon'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 Hon'ble High Court of Allahabad has dealt with the said issue and has held as under:

> *"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."*

8. Further, the Hon'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 employer-employee 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)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

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