Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

Service Tax Appeal No. 10596 of 2014 - DB

(Arising out of OIO-DMN-EXCUS-000-COM-011-13-14 dated 04/10/2013 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN)

Emerson Process Management I Pvt. Ltd **.....Appellant**
Plot No. 145/4, Ttc Industrial Area,
Midc Pawane,
Navi Mumbai,
Maharashtra

VERSUS

C.C.E. & S.T.-Daman **.....Respondent**
3rd Floor...Adarsh Dham Building,
Vapi-Daman Road, Vapi
Opp.Vapi Town Police Station,
Vapi, Gujarat- 396191

APPEARANCE:
Shri Mehul Jivani, Chartered Accountant for the Appellant
Shri Sanjay Kumar, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR

Final Order No. 10436/2024

DATE OF HEARING: 30.01.2024
DATE OF DECISION: 19.02.2024

RAMESH NAIR

M/s. Emerson Process Management (I) Pvt. Ltd. (hereinafter referred to as Appellants) are engaged in the manufacture of excisable goods falling under Chapter 90 of the Central Excise Tariff Act, 1985 and holding Central Excise Registration as Manufacturer of goods & under Service Tax as Service Recipient.

1.1 The Appellants received order for supply of Delta V System and service contract for installation and commissioning of DCS System for Reliance Industries Limited (hereinafter referred in short M/s.RIL) for its Life Sciences Project at Mumbai. Subsequently, contract value of the said contract was increased due to increase in scope. The appellant has obtained service tax registration under the category of Commissioning and Installation Services as service provider for services provided to Reliance Industries Limited and paid the service tax on the whole contract value. The appellant awarded

major part of contract to M/s Fisher Rosemount System, Inc (Hereinafter referred in short as M/s.FRS) located outside India. The contract was given to M/s.FRS for Project Management Service, Application Software Engineering Service and URS Preparation Assistance Service. The break-up of the amount of consideration of US$ 26,58,325/- is as follows:

Sr. No.	Description	Amount(US$)
1	Project management	5,96,609
2	Application service	8,23,181
3	Skid FAT (on T&M basis) Protocol Execution	1,92,725
4	Training system service	3,952
5	Application software FAT	27,226
6	Validation	5,84,460
7	Complete URS Development	35,578
8	Travel and living expenses	1,47,023
9	Remote operator station – 22 nos. (Supply of goods)	2,47,562
	Total :	**26,58,325**

The contract value of the said contract was increased on two occasions by US $ 3,31,704 and US $ 3,44,660 and thus, total contract value was US $ 31,60,029.

1.2 The appellant has paid service tax under reverse charge mechanism on project management services and validation services under management consultant services and availed the credit of the same. The appellant has not paid service tax on the balance services as either same were relating to the software services, reimbursement of services or supply of goods. The Commissioner of Central Excise, Customs & Service Tax, Vapi, issued Show Cause Notice dated 20-06-2011 alleging that all the services rendered by M/s. FRS during the period March 2006 to March 2008 are covered under the category of Management Consultant Service and Appellant has short paid

Service Tax on 50% of the value of the invoice issued by M/s. FRS and demanded the service tax of Rs.84,07,207/-

1.3 The Commissioner, Central Excise, Customs & Service Tax Vapi vide Order in Original bearing No.DMN-EXCUS-000-COM-011-13-14 Dt. 04-10-2013 and confirmed the demand of Rs.84,07,207/- and imposed penalty equal to service tax amount under Section 78 of Finance Act, 1994.

2. Shri Mehul Jivani Learned Chartered Accountant appearing on behalf of the appellant submits as under:-

1. <u>Software related services are not taxable under the category of Management consultant services:</u>

The Commissioner has held that services provided by M/s FRS, USA reveals that all the impugned services are rendered to improve the operational efficiency of the beneficiary organization and which provide the effective solution to the client evolving business issues and thereby taxable under management consultant services.

As already stated above, the Appellants received order for supply of Delta V System and service contract for installation and commissioning of DCS System for Reliance Industries Limited (Hereinafter referred in short M/s.RIL) for its Life Sciences Project at Mumbai. The appellant awarded part of contract to M/s Fisher Rosemount System, Inc (Hereinafter referred in short as M/s.FRS) located outside India. The contract was given to M/s. FRS for Project Management Service, Application Software Engineering Service and URS Preparation Assistance Service. The break-up is already given in point no.3 above. The appellant has paid service tax under reverse charge mechanism on project management services and validation services under management consultant services. The appellant has not paid service tax on the balance services as either same were relating to the software services, reimbursement of services or supply of goods. The said activities were not taxable prior to 16.05.2008. The nature of service received by the appellant are once again reproduce below for each head of service :

a) **Application Software** for $ 8,23,181/- : M/s.FRS has developed the customized software for functioning of Delta V system as per the requirement of M/s.RIL. These software were located in CD form by M/s.FRS.

b) **Skid FAT (ON T & M basis)** Protocol execution for $ 1,92,725/- : The above software were loaded from CD form into Delta V System. After loading of the software, the function of the system were check on test basis. It is only a process of testing the software with the system.

c) **Training System Service** for $ 3,952/- : The operation of the software were explained to the persons of the customer by giving the training. This service is called as Training system service.

d) **Application Software** FAT for $ 27,226/- : It is testing of software activity to ensure that the software is developed based on customer's specification and requirement and make the necessary corrections in case of any deviations.

It can be seen that the above services are related to software only.

It will be further evident from the comparison of the activity narrated in the order placed on M/s Fisher Rosemount System Inc Life Sciences and order received from M/s Reliance Industries Ltd. that the major work of Installation & Commissioning of DCS System has been carried out by M/s Fisher Rosemount System Inc. Life Sciences. This is basically installing the application software of the machine. The other part of the work placed by M/s Reliance Industries Ltd. has been carried out by the Company itself.

It is submitted that upto 16.05.2008, Software related services were excluded it from the scope of 'consulting engineering services' in the definition itself. Once a particular service is excluded from the scope of service tax where it normally is supposed to fall then it cannot be taxed under some other category. This principle has been followed in the case laws of Federal Bank. Ltd. and also Lal Pathlabs Ludhiana, Collection Centre cases which have been cited earlier. Further, w.e.f. 16-5-2008, information technology service was introduced which contains the taxability of software related services.

In the case of **IBM INDIA PVT. LTD 2010 (17) S.T.R. 317 (Tri. - Bang.),** the department had demanded the service tax on the software related services under the category of management or business consultant services. The tribunal has held Department attempted to classify the ERP services under 'management consultancy service' earlier and the Tribunal's decisions categorically held that during those time, the said services would fall under the category of consulting engineering services, however, they were excluded from the scope of consulting engineering services by virtue of initially an exemption Notification 4/99-S.T., dated 28-2-1999 initially and later by excluding it from the scope of 'consulting engineering services' in the definition itself. Once a particular service is excluded from the scope of service tax where it normally is supposed to fall then it cannot be taxed under some other category. This principle has been followed in the case laws of Federal Bank. Ltd. and also Lal Pathlabs Ludhiana, Collection Centre cases which have been cited earlier. Further held that w.e.f. 16-5-2008, information technology service was introduced and thereby it cannot be said that same was covered under the category of management or business consultant services prior to 16.05.2008 and thereby demand was set aside.

The supreme court has dismissed the department's appeal against the said order in **Commissioner v. IBM India Pvt. Ltd. - 2010 (18) S.T.R. J137 (S.C.).**

In the present case, appellant has not paid service tax on Application Software Engineering Service received from abroad. The same will clearly not taxable up to the period of 16.05.2008.

Further, by relying upon the said judgment, Ahmedabad tribunal in the case of **BASF INDIA LTD VERSUS C.C.E. & S.T. -SURAT-II 2023 (6) TMI 997 - CESTAT AHMEDABAD,** has also held that the department can not demand the service tax on the software related services under the category of management or business consultant services.

It is further submitted that In the case of **Basti Sugar Mills Co. Ltd. v. CCE [2007] 7 STR 431 (New Delhi-CESTAT)**, the tribunal observed that the definition of 'management consultant' envisaged advisory service only and not management functions or executable services. The department's appeal against the said order was dismissed by the supreme court in **Commissioner v. Basti Sugar Mills Co. Ltd. - 2012 (25) S.T.R. J154 (S.C.).** In the present case there is development, installation and commissioning of Delta V System and not mere advice or consultancy and thereby will not be liable to service tax.

2. **The service for which demand was made was subsumed in the total service and it's value which was charged by the appellant to their client i.e. RIL and the said total value suffered service tax in the hands of appellant themselves. The demand of service tax in the present case amounts to double taxation on the part of the same service charges.**

It is submitted that the appellants received the order for supply of Delta V System and service contract for installation and commissioning from M/s. Reliance Industries Ltd for its Life Science project at Mumbai. The Appellants paid the service tax on the entire amount received for service contract from M/s.RIL. The same is not disputed either in SCN or in OIO. The sample copies of invoices are attached at page 271 to 282 of the appeal file.

The appellant awarded part of contract to M/s Fisher Rosemount System, Inc (Hereinafter referred in short as M/s.FRS) located outside India. The Show Cause Notice demanded service tax under import of service in respect of services provided by M/s.FRS to the Appellants. In the present case, M/s.FRS is the sub-contractor. The show cause notice also admit that in para 9 that the project order issued by the customer namely M/s.RIL on the Appellants is a single contract and the service provided by M/s.FRS cannot be recognized as a 50% for separate activity as per the Contract. The same has also been observed by the Commissioner in para 48 of the OIO. Thus, SCN as well as OIO itself treats the service provided by M/s FRS as part of the contract awarded by the RIL to the appellant.

In the case of **SAROVAR HOTELS PVT. LTD 2018 (10) G.S.T.L. 72 (Tri. - Mumbai),** tribunal observed that the so called service of Franchise was provided by PG, USA to the appellant for which the appellant has paid the fees in convertible foreign exchange, this amount was paid out of the total receipt by the appellant from the ultimate service recipient i.e. Indian Hotels therefore the service received from PG, USA got subsumed in the service provided by the appellant to Indian Hotels. It was held by the tribunal that there is no dispute that the appellants have discharged service tax on the overall services provided to Indian Hotels. The service on which demand was made was subsumed in the total service and it's value which was charged by the appellant to their client i.e. Indian Hotels and the said total value suffered service tax in the hands of appellant themselves. The demand of service tax in the present case amounts to double taxation on the part of the same service charges. The tribunal has further held that the issue is also revenue neutral in nature and therefore set aside the demand.

In the present case, the company executed an order for Supply of Delta V System and service contract for installation and commissioning of the DCS system for Reliance Industries for its Life Sciences Project at Mumbai. The Life science being a new to India and is also complicated subject, company has sub-contracted major part of the Service Order to M/s Fisher Rosemount vide letter bearing no. RLS-LSFBIC/001 dtd. 02.09.2005. The appellant has obtained service tax registration under the category of Commissioning and Installation Services as service provider for services provided to Reliance Industries Limited and paid the service tax on the whole contract value.

Thus, the appellants have already paid service tax on the services rendered to M/s RIL. Part of the services are rendered by M/s FRS. The appellants have raised invoice on M/s RIL which includes the value of service rendered by M/s FRS. Therefore service tax on the entire service has already been paid. Therefore it is submitted that the service tax cannot be demanded second time for the services rendered by M/s FRS. The appellants submitted that the service tax is paid by the receipt of service tax cannot be demanded from the provider of

taxable service again and vice versa. The appellants rely upon the following judgments:-

- Navyug Alloys Pvt. Ltd. Vs C.C,Ex.,Vadodara-II, 2009 (13) STR 421 (Tri. - Ahmd.)
- Angiplast Pvt. Ltd. Vs C. of ST, Ahmedabad, 2013 (32) STR 628 (Tri – Ahmd,)
- C. of ST, Meerut-II Vs Geeta Industries P. Ltd., 2011 (22) S.T.R. 293 (Tri. - Del.)

These judgments lays down the proposition that for the very same service, service tax cannot be demanded on second time.

3. **The amount received shall have nexus to the taxable service rendered in order to consider the said amount as value of taxable service.**

The Central Board of Excise & Customs vide **circular No. 65/14/2003-ST dated 5-11-2003** has clarified that each and every amount received by the service provider cannot be considered as value of taxable service. The amount which has nexus to the taxable service provided can only be considered as value of taxable service. The same was held by the supreme court in the case of **BHAYANA BUILDERS (P) LTD 2018 (10) G.S.T.L. 118 (S.C.) and Intercontinental Consultants & Technocrats Pvt. Ltd 2018 (10) G.S.T.L. 401 (S.C.)**

As submitted above, the Application software services, Skid FAT (ON T & M basis) Protocol execution, Training System Service & Application Software FAT has no nexus to the taxability of management consultancy and hence the amount received towards the same shall not be considered as value of taxable service.

4. **Demand is not sustainable as the entire exercise is revenue neutral.**

As already mentioned above, appellant was paying service tax on the project management and validation services provided by M/s FRL under the category of Management consultant services under reverse charge mechanism. The appellant was availing the credit of the same.

The sample copy of Cenvat credit register is already attached as **Annexure-1** to substantiate that the same.

The tribunal in the case of **SAROVAR HOTELS PVT. LTD 2018 (10) G.S.T.L. 72 (Tri. - Mumbai)** has dropped the demand on the ground the revenue neutrality. Further, in the case of **JET AIRWAYS (I) LTD 2016 (44) S.T.R. 465 (Tri. - Mumbai)** has held that services received by the appellant on which demand has been made on reverse charge basis are directly linkable to the output services provided by the appellant and thereby situation is revenue neutral and thus service tax cannot be demanded. The same has been approved by the supreme court. The appellant further relies upon the following judgments:

- Coca-cola India Pvt. Ltd. 2007 (213) ELT 490 (SC)
- Indeos ABS Ltd. 2010 (254) ELT 628 (Guj)
- Indeos ABS Ltd 2011 (267) ELT A 155 (SC)

5. <u>Entire demand is barred by limitation.</u>

The show cause notice was issued in November 2010 whereas the demand raised for the period prior to March 2006 to March 2008 and thus entire demand is barred by limitation.

As already explained in detail the appellant had bona fide belief that the software related are outside the purview of service tax and hence service tax was not paid on the said portion.

In the case of **CONTINENTAL FOUNDATION JT. VENTURE 2007 (216) E.L.T. 177 (S.C.)**, Supreme court has held that Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Further held that in the case wherein interpretation is involved then extended period of limitation cannot be invoked.

Further, It has been consistently held that when there is a bonafide belief, the extended period shall not be invoked as there is no intention to evade the duty. The company relies upon the following judgments:

- Cosmic Dye Chemical Vs. Collector of Central Excise, Bombay 1995 (75) ELT 721 (SC).
- CCE Vs. Chemphar Drug and Liniments 1989(40) ELT 276 (SC)
- Pushpam Pharmaceuticals company VS. CCE Bombay 1995 (78) ELT 401 (SC)
- Tamil Nadu Housing Board 2004 (74) ELT 9 (SC)

As already stated in the aforesaid paras that there is revenue neutral situation. In the case of **NIRLON LTD 2015 (320) E.L.T. 22 (S.C.)**, Supreme court has held that whenever situation is revenue neutral than it can not be said that there was any malafide intention on the part of the assessee and thereby extended period of limitation can not be invoked. The appellant further, relies upon the following judgments:

- TENNECO RC INDIA PVT. LTD 2015 (323) E.L.T. 299 (Mad.)
- M/S. MARCK BIOSCIENCE LIMITED 2019 (7) TMI 653 - CESTAT AHMEDABAD

Further, in the case of **THAKARSHI J LIKHIYA VERSUS 2023 (6) TMI 847 - CESTAT AHMEDABAD**, tribunal has held that There cannot be any malafide in the facts of the present case for the reason that the main contractor discharged the entire service tax liability on the total value of the contract which includes the value of the service provided by the sub-contractor also. The appellant also relies upon the following judgment:

- M/S SHARMA DECORATORS VERSUS COMMISSIONER OF SERVICE TAX-DELHI 2023 (4) TMI 351 - CESTAT NEW DELHI

6. **Without prejudice to the above, in the case of services rendered by sub-contractors, service tax is not payable by the sub-contractor as long as the main contractor has paid the service tax on the entire value including the value charged by sub-contractor to the main contractor.**

As already stated above, the appellants received a contract for supply, installation and commissioning of DCS systems for M/s.RIL for its Life Science project at Mumbai. The Appellants has sub-contracted major

part of the service order to M/s.FRS. The Appellants is the Contractor and M/s.FRS is sub-contractor for the project. The Show Cause Notice demanded service tax under import of service in respect of services provided by M/s.FRS to the Appellants. In the present case, M/s.FRS is the sub-contractor. The show cause notice also admit that in para 9 that the project order issued by the customer namely M/s.RIL on the Appellants is a single contract and the service provided by M/s.FRS cannot be recognized as a separate activity.

Earlier, there were various circular which had clarified that sub-contractor need not pay service tax if main contractor pays the service tax. The some of which are as follows:

- Frequently asked Questions Published by Director of Publicity and Public Relation, Customs and Central Excise, New Delhi, October, 2003 - 2003 (158) ELT (T33)
- Trade Notice No. 53-C.E. (Service Tax)/97, dated 4-7-1997 of the New Delhi Commissionerate
- Trade Notice No. 5/98-Service Tax, dated 14-10-1998 of the Indore Commissionerate

Subsequently, only vide circular No. 96/7/2007-ST dated 23-8-07 it was clarified that Service Tax is payable by sub-contractor also. The supreme court in the case of **SUCHITRA COMPONENTS LTD 2007 (208) E.L.T. 321 (S.C.)** has held that the Beneficial circular to be applied retrospectively while oppressive circular applicable prospectively.

Further, in the case of **SHIVA INDUSTRIAL SECURITY AGENCY PVT LTD 2023 (7) TMI 60 - CESTAT AHMEDABAD**, tribunal has held that demand on the sub-contractor can not be made prior to the date of 23.08.2007.

7. **Reimbursement** of travel & living expenses cannot be included in value of taxable service under rule 7(1) of valuation rules. Further, same will not be liable to service tax in view of the supreme court judgment in the case of **Intercontinental Consultants & Technocrats Pvt. Ltd 2018 (10) G.S.T.L. 401 (S.C.).**

8. Without prejudice to the above, Supply of items for $ 2,47,562/- is goods and therefore not liable to service tax.

9. Without prejudice to the above, services received up to 18.04.2006 is not leviable to service tax as charging provision section 66A was incorporated w.e.f. 18.04.2006. The appellant relies upon the judgment of **INDIAN NATIONAL SHIPOWNERS ASSOCIATION 2009 (13) S.T.R. 235 (Bom.)**. The department's appeal against the said order was dismissed by supreme court in **Union of India v. Indian National Shipowners Association — 2010 (17) S.T.R. J57 (S.C.)**

Penalty.

As already explained in detail the appellant had bona fide belief that the software related are outside the purview of service tax and hence service tax was not paid on the said portion. Furthermore, there was a revenue neutral situation and thereby there was no malafide intention on the part of the appellant and therefore penalty under section 78 cannot be imposed. The appellant relies upon the submissions made in para 5 above.

3. Shri Sanjay Kumar, Learned Superintendent (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both the sides and perused the records. We find that the appellant had paid service tax on the reverse charge basis in respect of the service received from abroad M/s Fisher Rosemount System only on the some activities such as project management and validation service. However, for the remaining activities of the Foreign Service provider no service tax is paid on the ground that those services are related to software services which became taxable only with effect from 16.05.2008 where as the period in the present case involved is from March, 2006 to March, 2008.

4.1 We find prima facie force in the claim of the appellant that the services are not classifiable under 'management consultant service' whereas the same is prima facie classifiable as software services in view of the judgment in the case of IBM India Pvt. Ltd (Supra) and the services of software came

under the tax net w.e.f. 16.05.2008. However, without going into the merit of the case, we are of the view that the appellant have made out a strong case on limitation. In the present case against the same contract the appellant have been paying service tax in respect of some of the activity of service received from the board, whereas in respect other activities, they have not paid the service tax under a bona fide belief that those are related to software services.

4.2 Moreover, on the entire services they have been paying service tax while providing services to M/s Reliance Industries Ltd. It is also fact that whatever service tax was paid on the part of the activity i.e. project management and validation service, the appellant have availed the Cenvat credit and they are discharging the service tax in respect of overall services which includes all the activity of service received form abroad, while forwarding to M/s Reliance Industries Ltd. In this case, if at all there is any tax liability as claimed by the department the same is clearly available as Cenvat credit to the appellant. Therefore, the entire exercise is revenue neutral. In this position, no mala fide can be attributed to the appellant as there is no intent to evade payment of tax due to revenue neutrality of the case. In various judgments cited by the appellant which are cited below, the demand was set aside only on the ground of revenue neutrality:-

- Jet Airways (I) Ltd 2016 (44) S.T.R. 465 (Tri. - Mumbai)
- Sarovar Hotels Pvt. Ltd 2018 (10) G.S.T.L. 72 (Tri. - Mumbai)
- Continental Foundation Jt. Venture 2007 (216) E.L.T. 177 (S.C.)
- Cosmic Dye Chemical Vs. Collector of Central Excise, Bombay 1995 (75) ELT 721 (SC).
- CCE Vs. Chemphar Drug and Liniments 1989(40) ELT 276 (SC)
- Pushpam Pharmaceuticals company VS. CCE Bombay 1995 (78) ELT 401 (SC)
- Tamil Nadu Housing Board 2004 (74) ELT 9 (SC)
- Nirlon Ltd 2015 (320) E.L.T. 22 (S.C.)

4.3 In view of the above judgments, it is settled law that when there is a revenue neutrality in any demand no suppression of the fact can be attributed to the assessee. The present case is on much batter footing as the appellant has paid service tax on the part of the activity of the service

received from abroad. Therefore, there was no suppression of fact on the part of the appellant. Moreover, the present case is clearly of revenue neutral. In the present case, the demand was raised for the period from March, 2006 to March, 2008 whereas the show cause notice was issued on 20.06.2011 i.e. much after the normal period. Accordingly, the entire demand falls under the extended period.

5. Accordingly, we are of the view that the demand is not sustainable on the ground of limitation itself. Hence, impugned order is set aside and appeal is allowed.

(Pronounced in the open court on 19.02.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

Raksha