(2024) 12 CESTAT CK 0013

Customs, Excise And Service Tax Appellate, New Delhi

Case No: Service Tax Appeal No. 52442 of 2016

Power Finance Corporation Limited		APPELLANT
	Vs	
Commissioner of Central Excise and Service Tax-LTU Delhi		RESPONDENT

Date of Decision: Dec. 11, 2024

Acts Referred:

- Finance Act, 1994 - Section 65(44), 65(68), 65(104c), 65(105)(zzzq), 65(105)(k)
- Central Excise Act, 1944 - Section 11B
- Insurance Act, 1938 - Section 2(1)

Hon'ble Judges: Dr. Rachna Gupta, Member (J); Hemambika R. Priya, Member (T)

Bench: Division Bench

Advocate: Atul Gupta, Varun Gaba, Manoj Kumar

Final Decision: Dismissed

Judgement

Hemambika R. Priya, J

1. The present appeal has been filed by M/s Power Finance Corporation Limited, the appellant to assail the Order-in-Appeal No.

10/ST/LTU/DLH/2016 dated 25.05.2016 wherein the Commissioner (Appeals) has rejected the refund claim amounting to Rs. 2,49,16,169/- filed by

the appellant.

2. The brief facts of the case are that the appellant was engaged in providing service under the category of Banking & Other Financial Services,

Management Consultant Services, Credit Rating Fees, Sponsorship & Consulting Engineering Services. An audit of records of the appellant was

conducted by the Department covering period 2008-09 to 2010-11. Thereafter, the department requested the appellant to deposit Rs. 1,46,39,167/-

(including interest of Rs. 40,91,313/-) as tax up to Nov 2010 under the categories of 'Manpower Recruitment and supply agency services' taxable

under Section 65 (68) & 65 (105)(k) and 'Business Support Services' as per section 65(104c) & 65(105) (zzzq) of the Finance Act, 1994. The

appellant deposited the said amount of Rs. 2,49,16,169/- (including interest of Rs. 39,85,151/-) up to 10.04.2012 on 18.04.2012. Thereafter, as realised

by the appellant that the activity carried on by them was not taxable, the appellant filed a refund claim for the said amount. Following which, a Show

Cause Notice dated 03.09.2012 was issued to the appellant proposing to reject the refund claim. Vide the order dated 09.01.2015, the adjudicating

authority rejected the refund claim of the appellant. Being aggrieved, the appellant filed an appeal before the Ld. Commissioner (Appeals) which was

dismissed. Hence, the present appeal is filed before this Tribunal.

3. Learned Counsel for the appellant submitted that as per the definition of ""Manpower recruitment or supply agency services"", it is clearly mentioned

that the service provider should be engaged in providing the said services in the normal course of business. However, on the contrary, the appellant

was not engaged in transferring its employees to PFCCL on regular basis. Hence, the appellant was of the opinion that mere solitary transaction of

transferring of employees to its subsidiary to support its working, cannot be considered as Manpower recruitment or supply agency services. In

support of his submission, the learned counsel relied upon the following case laws:-

â€¢ ITC Ltd. v. Commissioner of Service Tax, New Delhi, 2012-TIOL-855-CESTAT- DEL

â€¢ Commissioner of Service Tax. v. Arvind Mills Ltd., 2014 (35) STR 496 (Guj.)

â€¢ Airbus Group India Pvt. Ltd. Vs. Commissioner of Service Tax, Delhi- 2016 (45) S.T.R. 120 (Tri. - Del.)

â€¢ Paramount Communication Ltd. v. Commissioner of Central Excise, Jaipur, 2013-TIOL-37-CESTAT-DEL, Delhi CESTAT

3.1 Learned Counsel further submitted that the Department has alleged that the appellant had charged to the extent of 36% of salary and allowances

of the employees that were transferred to the appellant. Hence, these charges should be taxable under 'Business Support Services'. In this regard, the

learned counsel submitted that sharing of expenses incurred by one group company with another does not lead to a case of rendering of service. He

added that in the present case, it was merely a reimbursement of expenses with respect to the employees transferred. Hence, the levy of service tax

under Business Support Services' is liable to be dropped. The learned counsel has relied upon the following case laws in his support:-

â€¢ Tata Technologies Ltd. vs. Commissioner of Central Excise, 2007(8) STR 358

â€¢ Reliance ADA Group Pvt Ltd. v. Commissioner of Service Tax. Mumbai-IV, 2016 (3) TMI (810).

â€¢ Union of India Vs. Intercontinental Consultants and Technocrats Pvt. Ltd., 2018 (10) G.S.T.L. 401 (S.C.)

â€¢ Rural Electrification Corpn. Ltd. Vs. Commissioner of S.T., New Delhi, 2020 (40) G.S.T.L. 339 (Tri. - Del.)

3.2 Learned Counsel further contended that the Commissioner (Appeals) while passing the impugned order, rejecting the refund claim of the appellant

on the ground that the appellant has no 'locus standiâ€™ to file the refund claim. In this regard, he submitted that the refund claim was filed by the

appellant only and thereafter, the show cause notice proposing the rejection of refund claim was issued to the appellant. Therefore, it cannot be

contended on the part of the department that the appellant has no 'locus standi' to seek refund claim. Further, the learned counsel submitted that the

appellant being a Public Sector Undertaking, the bar of 'Unjust enrichment' does not apply to the appellant. The appellant enclosed a 'Affidavit' with

the Appeal, stating that as soon as the amount of refund is sanctioned to the appellant, the same would be transferred to M/s PFC Consulting Limited

(hereinafter referred to PFCCL). Thus, it cannot be said that the appellant does not have the 'Locus Standi."" In support of his submission, the learned

counsel has relied upon the following decisions:-

â€¢ Goodyear South Asia Tyers Pvt. Ltd. Vs. Commissioner of Central Excise, Nagpur, 2011 (4) TMI 488-CESAT, Mumbai

â€¢ General Manager, Govt. Milk Scheme Vs. Commissioner Of C. Ex., Narpur, 2010 (19) S.T.R. 798

â€¢ Khanna Constructions Vs. Commissioner Of Customs, CGST & C. Ex., Jodhpur, 2020 (33) G.S.T.L. 111 (Tri. - Del.)

â€¢ Commissioner Of Customs, Mangalore Vs. Hindustan Organic Chemicals Ltd., 2021 (377) E.L.T. 605 (Kar.)

â€¢ Commissioner of C. Ex., Chennai - I Vs. Suprintending Engineer, TNEB, 2014 (300) E.L.T. 45 (Mad.)

â€¢ Ravindra Kumar Gupta & Sons Vs. Commr. Of CGST, Delhradun, 2022 (66) G.S.T.L. 220 (Tri. - DeL.)

â€¢ Lamina International Vs. Commissioner of C. Ex., Bangalore â€" III, 2009 (239) E.L.T. 232 (Kar.)

â€¢ Cyma Industries Vs. Collector of Central Excise, Rajkot, 1997 (96) E.L.T. 309 (Tribunal)

â€¢ Oswal Chemicals & Fertilizers Ltd. Vs. Commissioner of C. Ex., Bolpur, 2015 (318) E.E.T. 617 (S.C.)

3.3 Learned Counsel further contended that even though the transfer of employees by Corporation into its subsidiary and reimbursement of expenses

is not a taxable activity, the appellant had deposited an amount of Rs. 2,09,31,018 towards the service tax and Rs. 39,85,151/- towards interest. The

departmental authorities were not justified in taking such voluntarily deposit to tax to mean that audit objection regarding leviability of service tax had

been accepted by the appellant. The mere fact of non-mentioning of such payment being under protest on the face of challan and deposit of tax

beyond the period as demanded by the department is not a valid ground to reject the refund when the activity carried on by the appellant was not

subject to Service Tax. Moreover, the aforesaid amount was deposited on being pointed out, cannot be considered as acceptance on the part of the

appellant. In support of his submissions, the learned counsel has relied upon the following decisions:-

â€¢ Flex Art Foil Pvt. Ltd. Vs. Commissioner of Central Excise, Daman, 2011 (22) S.T.R. 591 (Tri. - Ahmd.)

â€¢ Raj Petro Specialities P. Ltd. Vs. Commissioner of Central Excise, VAPI, 2009 (246) E.E.T. 489 (Tri. - Ahmd.)

3.5 Learned Counsel further submitted that appellant had already recovered the amount of Service Tax from its subsidiary (the appellant) and in this

context had filed an affidavit in the present appeal to assure that the amount allowed as a refund, would be remitted back by the appellant. The

appellant has recovered both tax and interest from its subsidiary and accordingly, a letter dated 10th March, 2015 was filed with the department

intimating the same and therefore, it is submitted the refund of interest only, if allowed, may be transferred to the appellant.

4. Learned Authorized Representative for the Revenue while reiterating the findings in the impugned order, submitted that at the time of filing of

refund application dated 18.04.2012, the appellant had submitted the grounds for claiming refund as ""the amount with interest deposited was not a tax

and was deposited for the sake of peace of mind under departmental pressure as a matter of compliance"". In this context, he submitted that, on being

pointed out by the Audit party to pay the service tax upto November, 2010, the appellant had voluntarily deposited the service tax along with interest

upto March-2011 without any protest and informed the same to the department vide their letter dated 08.07.2021. Once service tax liability has been

accepted and voluntarily paid with interest, the appellant cannot turn around and challenge the same. In support of his submission, the learned AR

relied upon the decision of the Honâ€™ble High Court Of Delhi in case of M/s. Vijay Steelcon Pvt. Ltd. Versus Principal Commr. of C.T. (GST),

Delhi East, W.P. (C) No. 13034 of 2021, decided on 18-11-2021.

4.1. Learned Authorized Representative further submitted that the appellant had filed appeal before Commissioner (Appeals) for refund of interest,

however, they have already passed on the incidence of such tax and interest to the appellant. Hence, the refund claim is inadmissible under the

provisions of Section 11B of Central Excise Act, 1994. The appellant had rendered the services of manpower recruitment or supply agency service.

C.B.E. & C. vide F. No. B/3/16/TRU, dated 27-7-2005 has clarified that service tax has to be charged on the full amount of consideration received

for the supply of manpower and the value includes recovery of staff costs from the recipient, e.g. salary and other contributions. Even if these

amounts are paid directly to the workers by the service recipient, these amounts are still part of the consideration and hence forms part of the gross

amount charged. In this regard, the learned AR relied upon the following decisions:-

â€¢ The Apex Court judgement in Civil Appeal No. 2289-2293 Of 2021 in case of Commissioner Of Custom Central Excise &

Services Tax- Bangalore (Adjudication) etc Vs M/s Northern Operating Systems Pvt Ltd, 2022-TIOL- 48-SC-ST-LB

â€¢ Decision of the Hon'ble High Court of Delhi in case of M/s. Vijay Steelcon Pvt. Ltd. Versus Principal Commr. OF C.T. (GST),

Delhi East, W.P. (C) No. 13034 of 2021, decided on 18-11-2021

â€¢ Final Order No. 60191 of 2023 in Appeal No. E/988 of 2010, decided on 12-7-2023 passed by CESTAT, Regional Bench,

Chandigarh in case of M/s. Himachal Futuristic Communications Ltd., Unit-I Versus Commissioner Of Central Excise, Chandigarh-1,

(2023) 9 Centax 374 (Tri.-Chan)

â€¢ Apex Court Judgement in Civil Appeal No. 2807 of 2004, decided on 30-3-2015 in case of M/s. Oswal Chemicals & Fertilizers Ltd.

Versus Commissioner of Central Excise, Bolpur, 2015 (318) ELT 617 (S.C.)

In light of above, learned AR prayed that the present appeal may be dismissed.

5. Heard the Ld Counsel for the appellant and the Ld AR for the Department, and perused the case records. The issue before us is whether the

activity of deputing officials to subsidiary companies is manpower supply service or not.

6. We note that the issue of supply of manpower was settled by the Honâ€™ble Supreme Court in their decision in the case of Commissioner Of

Custom Central Excise & Services Tax- Bangalore (Adjudication) etc Vs M/s Northern Operating Systems Pvt Ltd supra. In the context of the

present case, we note that the dispute relates to the period 2008-09 to 2010-11. Consequently the definition for the relevant period is required to be

considered. The relevant paragraphs of the Apex Courtâ€™s judgement are reproduced hereinafter:

â€œ30. Before the amendment of the Finance Act, its provisions, to the extent they are relevant are extracted hereunder. The definition of

â€˜manpower recruitment or supply agencyâ€™ and â€˜taxable serviceâ€™ under the definition clause is extracted below:

â€œDefinitions.

65. In this Chapter, unless the context otherwise requires, (1) ""actuary"" has the meaning assigned to it in clause (1) of section 2 of the

Insurance Act, 1938 (4 of 1938); who renders any advice, consultancy or technical assistance, in relation to financial management, human

resources management, marketing management, production management, logistics management, procurement and management of

information technology resources or other similar areas of management)

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Substituted by the Finance Act, 2005, w.e.f. 16.06.2005. (68) ""manpower recruitment or supply agency means any [person) engaged in

providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, ""[to any other

person);]

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(105) ""taxable service"" means any service provided Inserted by the Finance Act, 2005, w.e.f. 16.06.2005 (or to be provided),-

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Substituted by the Finance Act, 2005, w.e.f. 16.06.2005 ((k) Substituted for ""to a client"" by the Finance Act, 2008, w.e.f. 16.05.2008. (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. Inserted by the Finance Act, 2007, w.e.f. 01.06.2007

[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;..

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43. A plain reading of the definition of â€œmanpower recruitment agencyâ€ (per Section 65 (68) of the unamended act) requires that to fall

within that description.

(a) a person (the expression is not defined, however, by Section 3 (42) of the General Clauses Act, the term includes ""any company or

association or body of individuals whether incorporated or not"");

(b) provides service

(c) directly or indirectly,

(d) in any manner for recruitment or supply of manpower,

(e) temporarily or otherwise

46: From the above discussion, it is evident, that prior to July 2012, what had to be seen was whether a (a) person provided service (b)

directly or indirectly, (c) in any manner for recruitment or supply of manpower (d) temporarily or otherwise. After the amendment, all

activities carried out by one person for another, for a consideration, are deemed services, except certain specified excluded categories. One

of category is the provision of service by an employee to the employer in relation to his employment.

47. One of the cardinal principles of interpretation of documents, is that the nomenclature of any contract, or document, is not decisive of

its nature. An overall reading of the document and its effect is to be seen by the courts.

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49. A co-joint reading of the documents on record show that:

(i) Attachment 1 to the service agreement ensures that the overseas group company assigns, inter alia, certain tasks to the assessee,

including back-office operations of certain kind, in relation to activities, or that group companies or entities.

(ii) The assessee is paid a mark-up of 15% of the overall expenditure it incurs, by the overseas company (clause 2, read with attachment 1

of the Service Agreement);

(iii) By the Secondment Agreement, the parties agree that the overseas employees is loaned to the assessee (clause 2 read with attachment 1

of the Service Agreement.

(iv) During the period of secondment, the assessee has control over the employee, i.e., it can require the seconded employee to return and

likewise, the employee has the discretion to terminate the relationship (Article II);

(v) The overseas employer (group company) pays the seconded employee, which is reimbursed to the overseas company, by the assessee

(Article III);

50. The above features show that the assessee had operational or functional control over the seconded employees; it was potentially liable

for the performance of the tasks assigned to them. That it paid (through reimbursement) the amounts equivalent to the salaries of the

seconded employees because of the obligation of the overseas employer to maintain them on its payroll, has two consequences: one, that the

seconded employees continued on the rolls of the overseas employer, two, since they were not performing jobs in relation to that employer's

business, but that of the assessee, the latter had to ultimately bear the burden. There is nothing unusual in this arrangement, given that the

seconded employees were performing the tasks relating to the assessee's activities and not in relation to the overseas employer. To put it

differently, it would be unnatural to expect the overseas employer to not seek reimbursement of the employees' salaries, since they were, for

the duration of secondment, not performing tasks in relation to its activities or business

51. As discussed previously, there is not one single determinative factor, which the courts give primacy to, while deciding whether an

arrangement is a contract of service (as the assessee asserts the arrangement to be) or a contract for service. The general drift of cases

which have been decided, are in the context of facts, where the employer usually argues that the pension claiming to be the employee is an

intermediary. This court has consistently applied one test: substance over form, requiring a close look at the terms of the contract, or the

agreements.

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53. Facially, or to put it differently, for all appearances, the seconded employee, for the duration of her or his secondment, is under the

control of the assessee, and works under its direction. Yet, the fact remains that they are on the pay rolls of their overseas employer. What is

left unsaid- and perhaps crucial, is that this is a legal requirement, since they are entitled to social security benefits in the country of their

origin. It is doubtful whether without the comfort of this assurance, they would agree to the secondment. Furthermore, the reality is that the

secondment is a part of the global policy of the overseas employer loaning their services, on temporary basis. On the cessation of the

secondment period, they have to be repatriated in accordance with a global repatriation policy (of the overseas entity).

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56. This court, upon a review of the previous judgment in Sushilaben Indravadan (supra) held that there no one single determinative test,

but that what is applicable is â€œa conglomerate of all applicable tests taken on the totality of the fact situation in a given case that would

ultimately yield, particularly in a complex hybrid situation, whether the contract to be construed is a contract of service or a contract for

service. Depending on the fact situation of each case, all the aforesaid factors would not necessarily be relevant, or, if relevant, be given

the same weight.

57. Taking a cue from the above observations, while the control (over performance of the seconded employees' work) and the right to ask

them to return, if their functioning is not as is desired, is with the assessee, the fact remains that their overseas employer in relation to its

business deploys them to the assessee, on secondment. Secondly, the overseas employer- for whatever reason, pays them their salaries. Their

terms of employment-even during the secondment are in accord with the policy of the overseas company, who is their employer. Upon the

end of the period of secondment, they return to their original places, to await deployment or extension of secondment.

58. One of the arguments of the assessee was that arguendo, the arrangement was ""manpower supply"" (under the unamended Act) and a

service (not falling within exclusion (b) to Section 65 (44)] yet it was not required to pay any consideration to the overseas group company.

The mere payment in the form of remittances or amounts, by whatever manner, either for the duration of the secondment, or per employee

seconded, is just one method of reckoning if there is consideration. The other way of looking at the arrangement is the economic benefit

derived by the assessee, which also secures specific jobs or assignments, from the overseas group companies, which result in its revenues.

The quid pro quo for the secondment agreement, where the assessee has the benefit of experts for limited periods, is implicit in the overall

scheme of things.

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60. This court is also of the view, for similar reasons, that the orders of the CESTAT, affirmed by this court, in Volkswagen and Computer

Sciences Corporation, are unreasoned and of no precedential value.

61. In view of the above discussion, it is held that the assessee was, for the relevant period, service recipient of the overseas group company

concerned, which can be said to have provided manpower supply service, or a taxable service, for the two different periods in question (In

relation to which show cause notices were issued).â€

7. In the context of the above decision, the arrangement between the appellant and its subsidiary M/s Power Finance Corporation Consulting Ltd

(hereinafter referred to as PFFCL) is required to be considered. An overall reading of the facts of this case shows that the employees of the appellant

were employed on secondment basis with PFFCL for their skills to run the subsidiary company viz., PFFCL. Such seconded employees had the option

to return to the appellant. It is also on record that the appellant charged the salary, allowances etc from PFFCL. It is also on record that that there

was a markup of 36% charged by the appellant in lieu of other expenses. We further note that the operational control on the employees was exercised

by M/s PFFCL. In view of the above stated position, we note that the said secondment of employees by the appellant to their subsidiary company is

squarely covered by the judgment supra. Accordingly, we hold that there was manpower supply service implicit in the transfer of the appellantâ€™s

employees to M/s PFFCL. Therefore, the payment of service tax on such service is correct and no refund is due to the appellant. The decisions relied

upon by the Ld Counsel stand overruled by the Honâ€™ble Supreme Courtâ€™s decision in the case of Northern Operating Systems supra.

8. We note that the impugned order has rejected the refund on the grounds that the appellant had collected the service tax from M/s PFFCL, hence no

refund can be claimed by them. The impugned order has also rejected the claim of refund of interest. It is also noted that the impugned order has also

held that service tax was rightly paid, hence there is no question of refund. We are in agreement with this conclusion.

9. Accordingly, the impugned order is upheld and the appeal is dismissed.

(Order pronounced in the open Court on 11.12.2024)