

**2010-TIOL-835-CESTAT-MAD**

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
SOUTH ZONAL BENCH AT CHENNAI**

**Appeal Nos. S/173/2008 and ST/220/2009**

Arising out of Order-in-Original No.37/2008 dated 14.05.2008 and Order-in-Original  
No.54/2008 dated 17.12.2008  
passed by the Commissioner of Service Tax, Chennai

**Date of Decision : 03.03.2010**

**Ms FUTURE FOCUS INFOTECH INDIA (P) LTD**

**Vs**

**COMMISSIONER OF SERVICE TAX, CHENNAI**

**Appellant Rep by :** Shri N. Venkataraman, Senior Counsel Shri G. Natarajan, Advocate  
Shri M.S. Krishna Kumar, Advocate

**Respondent Rep by :** Shri N. Rajagopalan, Special Counsel  
Shri V.V. Hariharan, Jt. CDR

**CORAM :** Smt. Jyoti Balasundaram, Vide-President  
Dr. Chittaranjan Satapathy, Technical Member

**Service Tax - Manpower recruitment and supply service - deputed supply of employees of the appellants to Infosys and TCS to perform the services specified under the contracts is taxable under Manpower recruitment or supply service.**

**There is no evidence produced to indicate that any of the software projects undertaken by TCS and Infosys from their respective clients has been sub-contracted to the appellants or that the appellants are working on any such project on their own. The appellants have deputed skilled personnel including computer engineers to work under the supervision and control of TCS and Infosys personnel in-charge of projects undertaken by TCS and Infosys. The appellants are getting paid in terms of the man hours for the persons deputed to work under the control and supervision of TCS and Infosys.**

**Though there are clauses relating to deliverables and quality of work in the contracts but these by themselves do not indicate that the appellants are providing information technology software services to TCS and Infosys. Any person or organization obtaining skilled personnel has to ensure that such men deliver work of standard quality. No one would employ a person who is not skilled enough and no one would pay for shoddy work even if done by a skilled man. TCS and Infosys are merely seeking to obtain personnel from the appellants with necessary skill who will work diligently on the projects undertaken by TCS and Infosys.**

**Penalty - no separate penalty under Section 78 is warranted specially keeping in view the fact that penalties under Section 76 and Section 78 have been made mutually exclusive by amendment of the law.**

## **Appeals disposed of**

### **Case law referred :**

C.C E & C Appeals Vs. Shreus Constructions [2005-TIOL-1515-CESTAT-BANG](#) ... .. Referred (Para 6)

CCE Vadodara Vs. Shri Vishwas R Gole [2009-TIOL-121-CESTAT-AHM](#) ... .. Referred (Para 6)

CCE, Mangalore Vs. Daylight Electronics P Ltd. [2006-TIOL-298-CESTAT-MAD](#)... .. Referred (Para 6)

Rohit Pulp and Paper Mills Ltd Vs. CCE [2002-TIOL-577-SC-CX](#) ... .. Referred (Para 6)

Diebold Systems P Ltd. Vs. Commissioner of Service Tax, Chennai [2008-TIOL-489-CESTAT-MAD](#)... .. Referred (Para 6)

Kerala Colour Lab Association Vs. UOI - [2003-TIOL-19-HC-KERALA-ST](#) ... .. Referred (Para 6)

### **FINAL ORDER Nos. 246, 247/2010**

#### **Per : Dr. Chittaranjan Satapathy :**

Heard both sides. Appeal No.S/173/2008 and ST/220/2009 relate to the appellants M/s. Future Focus Infotech (P) Ltd. The period involved and the amounts involved in these appeals are as given below:-

<b>Appeal No.</b>	<b>Period</b>	<b>ST + CESS (in Rupees)</b>	<b>Penalties (In Rupees)</b>
S/173/2008	16.6.2005 to 31.3.2007	Rs.2,63,96,919/-	Rs.100/- per day upto 18.4.2006 (Sec. 76) Rs.200/- per day or 2% p.m. (Sec. 76) after 18.4.2006 and Rs.3,00,00,000/- (Sec.78)
ST/220/09	April '07 to Sep. 2007	Rs.73,11,615/- plus interest	Rs.200/- per day (or) 2% of service tax, whichever is higher (Sec. 76)

2. The learned senior counsel Shri N. Venkataraman submits that the appeals relate to the agreement dated 1.7.2003 between the appellants and M/s. TCS and the agreement dated 6.7.2005 between the appellants and M/s. Infosys. In regard to these agreements he submits as follows:-

(A) Essence of Agreement with Infosys:-

(1) Clause 1 B defines Agreement

"Agreement" means the sub-contracting Agreement, the appendices hereto, any Task Orders, and any duly executed amendments thereto".

(2) Clause 1 D defines deliverables

"Deliverables" means all of the Object Deliverable works materials, software, documentation, methods, apparatus, systems and the like prepared, developed, conceived or delivered as part of or in connection with the services, and all tangible embodiments thereof the Consultant is required to deliver under the relevant Task Orders.

(3) Clause 1 G defines services

"Services" shall mean the software development, modification or other tasks, including Deliverables to be performed by the Consultant for Infosys, which are generally detailed in Appendix "E" to this Agreement and shall be specifically detailed in relevant Task Orders issued under this Agreement.

(4) Clause 1 H defines Task Order

"Task Order" means any statement of work expressly referring to issued under this Agreement and executed by authorized representatives of both Parties and shall at a minimum specify the following (a) the term of the Task Order (b) a detailed description of the Services covered by the Task Order (c) the Charges for the Services covered by the Task Order (including estimates for the ongoing maintenance and support resource requirements post-implementation).

(5) Clause 2 - Services: Clause 2 obligates the following:

- To perform and deliver services under Task Orders in accordance with the milestones, delivery date, specifications and requirements as set forth in the task order. (Clause 2A)
- Services to be performed only by appellant's representatives. Not to assign or sub-contract without express, prior written consent of Infosys. (Clause 2C)
- Responsibility of the Appellant to maintain and manage its tasks. If services of the personnel are unacceptable to Infosys, Appellant to provide qualified replacement to ensure continuity of services. (Clause 2D)
- It is expressly understood that services rendered by appellants to the customers of Infosys under the Task Orders shall be deemed to be services rendered to Infosys (Clause 2E)
- It is appellant's duty to determine the particular terms & conditions that are applicable to the work being provided to a specific customer (Clause 2H)
- If required, to provide report on quarterly basis summarizing the work performed, the progress and target completion date for such works (Clause 2I)

(6) Clause 3 - Acceptance Testing:

- Acceptance Testing means, whether relevant services comply with any specifications and requirements set forth in the task order and to the reasonable expectations of Infosys. (Clause 3A).

- Should the appellant fail in Acceptance Testing, deficiencies to be made up, not later than 10 days and within 30 days, appellants to undergo re-test. Should it fail again, it is the discretion of Infosys either to grant additional time or terminate relevant task order (Clause 3B)

(7) Clause 4 - Payment:

- Infosys will pay appellant for services utilized in accordance with Appendix A (Clause 4A)

(8) Clause 8 - Warranties:

- Appellant warrants that the services shall be performed in accordance with the specifications and documentation set forth in the relevant task order (Clause 8 All)

(9) Appendix E - Sample Task Order

- The appellants agree to provide services as set forth in the task order. Clause 1 of the Task Order identifies the services to be provided, scope of services, location of services, deliverables, milestone, acceptance procedures, reporting, the commencement and completion dates etc.

(10) Clause 12 - Terms & termination:

- What is sought to be terminated in case of failure to perform services, are only the task orders and not any staff, personnel or representatives. (Clause 12-D)

(B) Essence of Agreement with M/s Tata Consultancy Services

"Appellant willing to provide services in the nature of development, implementation, enhancement and maintenance works undertaken by TCS from its various clients by deputing its employees to TCS/TCS client locations to work on the project along with TCS Project Team".

(1) Clause 3 - Scope of activities

- Appellants to render services through its selected employees to work on computer software application development, implementation and maintenance of specific projects to be identified and allocated by TCS at its sole and absolute discretion and to carry out such functions and project related activities as may be allocated by TCS from time to time and under the overall guidance and supervision of TCS, on a fixed man-month basis (Clause 3(a)).
- Appellants to perform all activities commonly known and referred to as Software Development and Maintenance Activities. Such activities to include, without limitation, development, installation, demonstration, parameters setting user training, providing guidance to user, warranty support function etc. (Clause 3(b)).

(2) Clause 4.4

- If appellants default on providing continuous support services, during the project, TCS will deduct an amount, not exceeding two months' fee relating and attributable to the default from the compensation payable to them.

(3) Clause 4.6

"Should TCS be involved in the selection of employee of BA to perform Services, such involvement shall not obligate TCS to accept any liability whatsoever for the work performed by said selected employees, and the obligations of performance and the liability arising therefrom, including the acceptability of Deliverables shall rest solely with B.A. In the event any work performed by a BA Employee is not accepted by TCS/Client, the concerned BA Employee shall rework the deliverable and BA shall not be entitled to charge for the number of days such BA Employee works on the re-works".

3 The learned senior counsel refers to the following extract of relevant findings from the Order-in-Originals No. 37 of 2008 dated 14/5/2008 and No. 54 of 2008 dated 17/12/2008:-

- Para 6.2 - "Employees of Focus perform the services at customers' premises as per the requirements and directions of I.T Companies.
- The role of Focus is limited to supply of skilled manpower to I.T companies.
- Per se, Focus itself does not undertake any software development in its own premises.
- Further, Focus have no control whatsoever, on the technical nature of activities being carried out by its employees.
- Staff are deputed by Focus to TCS and the deputed Engineers are required to carry out the above task under the supervision of TCS.
- The role is limited to supply of qualified technical people.
- Focus are not even aware of the exact nature of software being / to be developed by the clients. Clients inform manpower requirement and Focus, in turn, supply man-power suited to the client's requirement (Para 7.3).

The learned senior counsel states that the above findings are not at all supported by any of the provisions of the relevant agreements between the appellant and M/s Infosys and M/s Tata Consultancy Services. In regard to the finding that Focus are paying service tax on the same activity rendered to IBM and Capgemini, the learned senior counsel states as follows:-

Since service tax has been collected, the same has been paid to the Government. No tax can be collected without the authority of law (Article 265 of the Constitution of India). There is no estoppel in taxation matters.

4. He does not press the issue of limitation in regard to these two appeals.

5. The learned senior counsel has also made the following additional submissions:-

(1) Criteria to identify whether the contracts under question should be classified as "Consulting Engineer" or "Manpower Supply"

The contractual obligations may arise under anyone of the following categories:

- a. A contract for rendition of a specified computer software service. This would get classified under "Consulting Engineer".
- b. A contract which obligates supply of certain number of people either temporarily or otherwise. This would get classified under "Manpower Supply".
- c. Question arises whether if a contract obligates rendition of "Computer Software" services and in the process also identifies the people who should render the services, whether such a contract obligating rendition of services through people should be classified under "Consulting Engineer" or "Manpower Supply".

(2) The appellants have already placed on record the relevant agreements and the clauses pertaining there to, which obligates the appellants to render services of "Computer Software" through identified people. In such circumstances the appellants submit that the following criteria will determine as to whether the contract is for rendition of "Consulting Engineer" services or "Manpower Supply".

(a) Deliverables:-

What is the ultimate deliverables under these contracts? Section 65(68) of the Finance Act 1994 defines "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. Parliament under manpower supply obligates the ultimate deliverable to be "Supply of manpower temporarily or otherwise". There is no contractual obligation for a manpower supply agency to undertake provision of any notified or specified services as a part or in addition to supply of manpower.

Section 65(68) as it originally stood prior to 16.06.05 reads as under:

"Manpower recruitment agency" means any commercial concern engaged in providing any service, directly or indirectly, in any manner for recruitment of manpower to a client." In other words, the definition initially was made applicable only for recruitment. Later with effect from 16.6.05 it got amended as "Manpower recruitment or supply agency".

The purpose of the legislation should be inferred from the expressions used namely "recruitment", "supply". Both in the case of recruitment and in the case of supply of manpower, the obligation of the service provider would end once people are recruited or people are supplied. The definition does not obligate any other requirement to provide any other specified services to fall under the category of "Manpower recruitment or supply agency".

Consequently, once the contract of service envisages deliverables in the nature of provision of services more specifically provision of a computer software service, such a provision of service cannot be classified as "Manpower supply", as it moves out of the said definition.

As a matter of fact it is self-evident that all the contracts on record clearly indicate that the deliverables are not mere supply of manpower, but provision of computer software services. (Clause 1 (d), (g), (h), Appendix E of Infosys Agreement / Clause 3(a), (b) of TCs Agreement.)

b. Responsibility:-

Service Tax Law is a contract driven legislation. It is the scope of the contract that would determine also its classification. For an agency which is involved in manpower recruitment and supply, the contractual responsibility can only be recruiting people or supplying people. The responsibility would end once the requisite people as agreed upon are supplied. On the other hand, if the responsibility is to render a specified service, which in the instance cases is computer software services, will it be open to the revenue to still classify the services as manpower supply. Contractual responsibilities are determinative of the classification of service. If the responsibility is for supply of manpower it would be a "manpower supply agency", on the other hand if the responsibility is to render technical assistance while providing computer software services, the same has to get classified only under "Consulting Engineer". (Clause 2A, 2D, 2I of Infosys / Clause 4.3,4.4,4.6 of TCS)

c. Accountability:-

The accountability in the case of a manpower supply would be in terms of furnishing or supplying the requisite manpower. The contractual obligations would terminate once the requisite people are mobilized and supplied to the service recipient. On the other hand, in the case of the consulting engineer the accountability is in terms of the work and performance done. The measure of accountability is not a number of people or heads who work at a particular site or project. It is the turn around of the quantum and quality of work agreed upon which becomes the yardstick of accountability. The contract clauses very clearly envisage periodical review, periodical audit visits, performance evaluation and accountability in terms of the mile stone and time frames in terms of the service level agreement. Such accountability cannot be defined as a Contract for supply of manpower recruitment. (Clause 2D, 2I, 2J, 3A, 3B, 8A(ii) of Infosys / Clause 4.3, 4.4, 4.6 of TCS).

d. Location:-

Computer software services are a high end technology service. It is a service which can be rendered or performed from any place or premises or location. There can be instances where a service provider will have all the necessary infrastructure to provide services from his own location and there may be service providers who may work using the infrastructure of the client and develop install, enhance, maintain or too other related computer software services as in the case of M/s Future Focus InfoTech Pvt. Ltd. Location therefore is immaterial. If performed from one zone / premises are termed as computer software services, it cannot become manpower supply merely because it is rendered or performed at the client's premises. As long as the scope of deliverables, responsibility and accountability is for provision or rendition of computer software services. The transaction would merit classification only under "Consulting Engineer" and will not become manpower supply.

When a computer software service is rendered from the service provider's own premises or location using his own infrastructure, the presumption if any, should go in favor of such service providers, classifying the services as "Consulting Engineer".

e. Defect Liability:-

The agreements on record very clearly evidence the fact that the end obligation is to provide computer software services. Failure to provide such a service or ineffective or defective provision of such a service, would contractually allow the service recipient to demand from the appellants, re-working the services to the absolute satisfaction of the service recipient. The agreements have even conceived an eventuality of termination of the service contract in case the defects are not cured to the satisfaction of the service recipients. On the other hand, if it is a manpower supply contract, such a contract can

neither conceive nor envisage a defect liability clause towards provision of service. (Clause 3A, 3B, 9A of Infosys / Clause 4.6 of TCS).

In short, defective supply of manpower is distinct from defective provision of service. The former will fall into the category of manpower supply while the later would get classified only as "Consulting Engineer".

f. Termination:-

The contracts on record would evidence the fact that a termination would arise for failure to provide the contracted services i.e. "Computer software services" and not failure to supply manpower. Termination clause can leave to litigate situations and all these contract envisages either arbitration or approaching the jurisdictional courts of law. A termination cannot be sustained for failure to supply manpower whereas it would get sustained for failure to deliver the scope of services as contracted to the complete satisfaction of the client. (Clause 12 of Infosys / Clause 12 and 13 of CTS)

All these contracts also envisage that in the case of pre-matured or early termination the work in progress should be conveyed to the client and payments would be made for that portion of the completed services.

g. Consideration:-

It's a common fact both in commerce and in law that consideration is only a measure and cannot go to identify or define a service. It cannot form the basis to define a contractual obligation. Consideration is money or money's worth for a rendering any type of services. It gets fixed contractually either on a lump sum basis, or fixed cost basis or a time and material basis. If the service provider uses his own infrastructure it will be a contract inclusive of the time spent and the material employed. On the other hand, if a service provider is to use the infrastructure of the client for the development of computer software the consideration could be for the time spent. In both cases as long as the contract is for provision of service and the deliverables, responsibility and accountability including termination is traceable to the provision of service and not supply of manpower, such a contract of service irrespective of the mode of payment which could be a per-diem basis would still be consulting engineer service and not manpower service. (Clause 4 of Infosys / Clause 7 of TCS)

h. Identification of manpower vis-a-vis supply of Manpower:

A contract for supply of manpower cannot stop with identification of manpower. It would start with identification and would culminate in its actual supply. Once manpower is supplied the complete control on such a manpower would wholly vest with the client. Such manpower would look for directions, obligations and commands only from the clients. These things are conspicuous by its absence in the contracts under question. A mere supervisory role does not vest control.

(3) The contract in the instant cases stops with identification of the work force. It defines the scope of work and also defines who should perform the scope of work, it no where defines that such scope of work by such people should be performed under the exclusive control of the client. If so the entire contract contemplating deliverables, attaching responsibilities, fastening accountability, making the appellants work on defects, leading to termination for failure to perform work would all become redundant and superfluous.

To strengthen the stand further appellants rely on clause 4.6 in the case of Future Focus. The same is extracted here under:

"Should TCS be involved in the selection of employee of BA to perform Services, such involvement shall not obligate TCS to accept any liability whatsoever for the work performed by said selected employees, and the obligations of performance and the liability arising, there from, including the acceptability of Deliverables shall rest solely with BA. In the event any work performed by a BA Employee is not accepted by TCS/Client, the concerned BA Employee shall rework the deliverable and BA shall not be entitled to charge for the number of days such BA Employee works on the reworks."

Clause 8A (ii) of Infosys Agreement reads as follows:

"A. Consultant warrants that the services:-

(ii) shall be performed in accordance with the specifications and documentation set forth in the relevant task order."

(4) A close scrutiny of these two clauses in the case of the respective appellants goes to clearly show that the entire contract is for provision of work and at the highest identifies people. It does not obligate supply of people nor do these people work solely under the control of the clients. To the contrary, the clients disown the responsibility of the work to be performed by such identified people and fasten the entire responsibility and liability on the respective appellants. In such circumstances how is it open to the revenue to construe the transaction as "Manpower Supply" and not "Consulting Engineer"?

(5) To reiterate, appellants respectfully submit that testing the transactions and the contract under question on the strength of the above parameters, it would become self-evident that the transaction under questions are not for "Manpower supply" but only provision of "Computer Software" services falling under Consulting Engineer.

(6) Without prejudice to the above submissions, assuming but not admitting if both the entries namely Consulting Engineer vis-a-vis Manpower Supply are considered to be constituting rival entries, then classification needs to be made in terms of Section 65A of the Finance Act 1994. There are three ground rules in terms of Section 65A of the Act Sub-clause (2)(b) of Section 65A is inapplicable to the cases since they deal with composite services. The remaining two clauses if invoked or applied would go squarely in favor of the appellants. Sub-clause (2) (a) of Section 65A indicates that the specific description should give way to the general description. The definition of "Consulting Engineer" services, the exemption given vide notification 4/99 ST dated 28/2/1999 for computer software, the subsequent exclusion under Section 65(105) (g) of the Finance Act 1994 excluding computer software engineering discipline from the purview of taxable service, its later induction with effect from 16.5.08 through an explanation and creation of a separate entry namely Information Technology Software Service with effect from 16.5.08 would go to show that the transaction under question would have to be categorized under the specific description of "Consulting Engineer" and not a general description "Manpower Supply".

(7) There is one more reason in classifying under consulting engineer. Section 65 of the Finance Act, 1994 is a definition clause, defining various notified services. There are several services which are identified and specifically noted, which are performed through human agency. To name a few are

- i. Section 65(105) (h) - Custom house agent
- ii. Section 65(105) (j) - clearing and forwarding agent.
- iii. Section 65(105) (q) - interior decorator

iv. Section 65(105)(w) - security agency

The appellants also placed on record services rendered by human agency in the form of advise, consultancy or technical assistance. These have been identified as specific services under

i section 65(105) (g) - Consulting engineer

ii Section 65(105)(r) - management or business consultant

iii section 65(105) (v) - real estate agent

iv section 65(105) (za) - Scientific or technical consultancy

v Section 65(105)(zzzze) - Information Technology Software Services.

In the light of the above, in terms of Section 65A (2) (a) specific description namely 'Consulting Engineer' should be preferred over general description 'Manpower Supply'.

In the alternative even should revenue test the transaction under Section 65A (2)(c) the classification has to be made in terms of the sub-clause which occurs first among the sub-clauses which equally merit consideration. If this test is applied "Consulting Engineer" comes first vide sub-clause (g) to Section 65 (105) as against 'manpower supply' which falls under sub-clause (k) to Section 65(105) of the Act.

(8) In short, even if rules of classification are applied, the transaction under question can only get classified under "Consulting Engineer" and not "Manpower supply". Based on the above, it is humbly prayed that the Hon'ble Tribunal may kindly be pleased to set aside the impugned orders and thus render justice.

6. In reply Shri N. Rajagopalan, learned special counsel for the Department has submitted as follows:-

In the appeals, the appellants have contested against the confirmation of the demand, interest and imposition of penalty on the following grounds:

(i) The services rendered fail in the category of 'Consulting Engineer's Services' as defined under clause (31) of section 65 of the Finance Act, 1994, (hereinafter referred to as the Act) and since the service was rendered in the field of computer software engineering, such service stood exempt from service tax, vide clause (g) of section 65(105) *ibid*,

(ii) Alternatively, the service fell under 'Business Auxiliary Service' in the field of IT services and fell outside the scope of service tax;

(iii) Or under IT Services, which came to be levied only from 16.5.2008;

(iv) Gross value to exclude the salary,

(v) Demand time-barred;

(vi) Penalty not imposable, when the scope of the service gave room for different interpretations.

**Point (i)** whether the services rendered by the appellant fell within the scope of 'Consulting Engineer's Service'? As per clause (31) of section 65 of the Act, 'Consulting engineer' means any professionally qualified engineer or any body corporate or any other firm who, either directly or indirectly, renders any advice, consultancy or technical assistance in any manner to a client in one or more disciplines of engineering". With effect from 1.5.2006, the words 'an engineering firm' were substituted by the words 'any body corporate or any other firm'. The words 'professionally qualified', and 'advice, consultancy or technical assistance' are words of significance and importance. They have to be given due importance, while interpreting the scope of 'consulting engineer's service'.

The agreements have not engaged/employed or assigned any project to the appellant for execution. Nor do they specify the projects for implementation of which, the assistance of the appellant was sought. Hence, it is necessary to see whether the persons deployed could be considered as 'consulting engineers'.

To come under the category of 'consulting Engineer's service', the person must be professionally qualified, with a minimum degree in the specific field of engineering from a recognized university. Thus, when the appellant claims that services rendered by them were in the field of computer software engineering, they must first establish that the persons employed possessed degree in computer science/ engineering. Whereas, perusal of the agreement with TO would reveal that the educational qualification of even MBA, CA and M Sc were included; vide condition 4.1 of the Agreement-Pages 67-68 of the paper-book. That is, TO needed other than engineers, as well. It is common knowledge that MBAs, CAs and MSCs are not engineers, and hence they do not qualify to be called 'consulting engineers'. The agreement with Infosys does not specifically restrict the selection to only computer software qualified engineers. Even if they are computer-literate by possessing any certificate of having attended a course on computer, they cannot be considered 'consulting engineers'. The Bangalore Bench of CESTAT have held in *C.C E & C Appeals Vs. Shreus Constructions* 2006(2) S.T.R 342 (Tri.-Bang) = [2005-TIOL-1515-CESTAT-BANG](#), that to consider one as a consulting engineer, one has to be professionally qualified by obtaining a degree or diploma in engineering from a recognized university. A certificate holder cannot be considered as an engineer, much less, a consulting engineer. Persons holding a degree of Master of Science in Chemistry is not a qualified engineer and hence, not covered under Consulting Engineer's service. 2009(14) S.T.R. 371 (Tri. Ahm) = [2009-TIOL-121-CESTAT-AHM](#). Thus, MBAs, CAs, MScs cannot be considered as professionally qualified engineers.

The Bombay High Court has held in *Dr. J.M.Mokashi Vs CIT 207 ITR 252* that professional qualification must mean qualification which is necessary for carrying on the particular profession. Mere work experience is not sufficient.

In *Commissioner of Central Excise, Mangalore Vs. Daylight Electronics P Ltd.* 2006 (1) S.T.R 264 (Tri.-Chennai) = [2006-TIOL-298-CESTAT-MAD](#), it has been held that to place a person within the ambit of 'consulting engineer', it must be first established that he is a professionally qualified engineer.

Advice, consultancy or - technical assistance - The scope of the service is to render advice, consultancy or technical assistance. It may be noted that there is no 'comma' between the words, 'consultancy' and 'technical assistance'. Thus the word 'or' is not a disjunctive but a conjunctive. It is a settled law that the meaning of a word has to be derived from the company it keeps, vide judgment of the Apex Court in the case of *Rohit Pulp and Paper Mills Ltd Vs. CCE* 1990 (47) E.L.T. 491 (S.C) = [2002-TIOL-577-SC-CX](#). Thus, 'technical assistance' would follow advice and consultancy, and also would not involve direct execution of the work. In any case, the appellant cannot render 'technical assistance' on matters not designed, developed or on which, he has no rights. It may be

pointed but that TCS/Infosys were to execute the projects with their employees and the manpower supplied by the appellant, and nothing existed for the appellant to render technical assistance. Supply of technically qualified men is not the same as rendering technical assistance. The Chennai Bench has held in *Spic-Smo Ltd. Vs. Commissioner* 2006 (3) S.T.R 557 (Tri-Chen) that only technical manpower was supplied and Consulting engineer's service was not rendered and hence service tax was not payable. Mere transfer of staff does not amount to providing consulting engineer's service 2009 (14) S.T.R 355 (Tri.-Ahm). The definition of 'consulting engineer's service, contemplates advice, consultancy or technical assistance as a service. 2007 (5) STR 281 (Tri.-Del).

The agreements with TCS/Infosys do not require the appellant to render any, advice, consultancy. The appellant has projected that they have a pool of highly skilled and specialized employees and expressed their willingness to provide them to TCS on subcontract basis to work along with the employees of TCS. Thus the agreement with both the clients are for supply of skilled employees and not for advice/ consultancy in the field of computer engineering. Distinction has to be made between execution of work by the appellant as against their employees placed at the disposal, control, supervision and guidance of the companies like TCS/Infosys. Once the employees are placed at the disposal of the clients, the appellant has no control over them, except for payment of their salaries and other administrative matters. Definitely, on technical matters, appellant has no role to play. If the contention of the appellant is to be considered, then the terms of the agreement would be totally different. It would have laid stress on the development, design and delivery of the project within the fixed time frame, retaining the right to test and exercise quality checks; it will not be concerned with the qualification etc., of the staff. It will not be the concern of TCS/Infosys to concentrate on staff, their qualification, compensation etc., as the responsibility will be on the appellant to deliver the goods, and they are not concerned as to how the appellant achieves the same, But the agreements are staff-specific, in that the various conditions and clauses in these agreements specify the various parameters in relation to the staff. They specify the qualification, experience, skills, the expectations from them, performance based output, confidentiality conditions, training etc. They work under the team leaders and under their guidance and control, which no consultant, 'worth the name, would do. The compensation is based on the number of Man-hours spent in the campuses of TCS/Infosys or at their clients' premises. If any staff is found wanting in performance, they will be sent back, and the appellant is to send replacement.

Professionally qualified engineers or consultant is an independent person engaged because of their proficiency in the field, and if he is to take the guidance and training or work under another person, then he is no longer a professionally qualified engineer. Hence, the service rendered by the appellant does not fall within the ambit of consulting engineer's service.

The true Purport of the agreement will be clear, if we look at clause 4.4 of the agreement with TCS. "4.4. if BA defaults on providing continuous-technical support services during the project, TCS will deduct an amount not exceeding 2 months fee relating and attributable to the default from the compensation payable to them."

A look at the instructions contained in paragraph 3.3 of the instructions F. No. B 43/5/97-TRU, dated 2.7.1997 (copy enclosed) will throw light on the scope of the services rendered by a consultant. Though the list is not exhaustive, it is illustrative. Hence, the services rendered by the appellant would not fall within the -scope of 'consulting engineer's service'.

If as claimed by the appellant they have executed any project, then they cannot be considered as having tendered advice, consultancy or technical assistance. When the agreements do not even indicate the type/ nature of project, it is not clear as to what

type of technical assistance could have been rendered. On this ground also, the claim of the appellant appears to be without any merits.

The invoices raised on Infosys mention the name of the person, while the invoices raised on TCS is for programme support. (Not for technical assistance).

***Point (ii)*** Whether falls under the category of Business Auxiliary Service? To come within this service, the service must be in relation to anyone of the 6 items specified under section 65(19) of the Act. The service rendered by the appellant does not fall under any of the 6 items. Mere supply of men does not fall under this service, or IT service. Further, the appellant has not rendered any service to the clients of TCS/ Infosys, but only to these companies. This is clear from the following.

Condition 4.5 of the agreement with TCS "The implementation and project Management will be done by TCS. This agreement does not obligate either to contract out any service to BA or to provide any minimum level of work to BA hereunder."

Agreement with Infosys. 2E. It is expressly understood and agreed that notwithstanding any service rendered by Consultant to Customers under any Task Orders such services rendered shall always deemed to be rendered to Infosys only. Thus, no service has been rendered on behalf of the client by the appellant. Thus, the service does not come within the purview of Business Auxiliary Service.

***Point (iii)*** Appellant has not stated under which of the items, he has rendered service under this category. The service should be one of IT Software for use by the client it is unthinkable that IT majors like TCS/Infosys would have requested the appellant to develop a software for them. In any case, so long as the definition of the Manpower recruitment or supply agency service is not changed, the service rendered would fall only under the category of manpower supply agency services. Further, the CESTAT have - held in - Diebold Systems P Ltd. 2008 (9) S.T.R 546 = [2008-TIOL-489-CESTAT-MAD](#) that introduction of service tax on a new service, presupposes its non coverage in the already existing services.

As against the above, the definition of Man Power Recruitment or Supply Agency under section 65(68), with effect from 16.06.2005 reads as:

"manpower recruitment or supply agency" means any commercial concern engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, to a client. The term 'commercial concern' was substituted by the term 'any person' with effect from 1.5.2006.

'Taxable service' means any service provided or to be provided to a client, by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or otherwise, in any manner'. The expression 'in relation to' has wide connotation. In Doypack Systems (F) Ltd Vs UOI, 1988(36)E.L.T.201 (S.C.), the Apex Court have ruled that, 'in relation to' would mean 'pertaining to'. Thus, the service of supply of manpower will fall under this service. The scope of this service is found explained in paragraph 22 of Service Tax Instructions F.No. B1/6/2005-TRU, dated 27.7.2005. Paragraph 22.2 is extracted below for ready reference. "A large number of business or industrial organizations engage the services of commercial concerns for temporary supply of manpower which is engaged for a specified period or for completion of particular projects or tasks. Services rendered by commercial concerns for supply of such manpower to clients would be covered within the purview of service tax."

Service tax is on the service rendered. The taxability has to be decided with reference to the activity undertaken. The principal purpose of the agreements is for supply of

manpower, and following the judgment of Kerala High Court in Kerala Colour Lab Association Vs. UOI - 2006 (2) S.T.R 554 (Ker) = [2003-TIOL-19-HC-KERALA-ST](#), the services rendered by the appellant falls squarely within manpower supply services. Taxability is not dependent on the work turned out by the persons supplied. Supply of men precedes, and that is when the service tax is attracted. The Mumbai Bench of CESTAT have held that the taxable event is rendering of service. Commissioner of CX & Cus, Vadodara Vs. L&T Ltd-2006 (4) S.T.R 63 (Tri- Mum). Further, even placing men on loan basis is held to be covered under the definition of 'manpower recruitment or supply agency' in the judgment reported in 2008 (10) S.T.R 268 (Tri.-Mumb).

The appellant admits to have paid service tax under this category for the men supplied to IBM, and Cap Gemini. That being the case, there is no reason why they should not have discharged the liability on supply of manpower to TCS/Infosys.

Since there is no ambiguity, there is no need to resort to Section 65A(2)(a) for classification.

***Point (iv)*** Value for purposes of the service tax is the gross value charged, as per section 67(1)(i) of the Act. Even rule 5(1) of the Service Tax (Determination of Value) Rules, 2006 states so. All the expenditure and costs incurred for rendering the service are liable to be included in the value. The illustrations cited by the appellant do not apply to this service.

***Point (v)*** Time-bar. The contention is not tenable. Since the returns have been filed, the time limit runs from the date on which the returns have been filed, vide section 73(6) (i) (a) Hence, the demand is not barred by time. Further, under proviso to section 73(1), in respect of suppression, there is no prefix of 'willful' as found against 'mis-statement' of facts. Hence, once the appellant had suppressed the actual activity, the demand is justified. Paragraph 13.5 of the impugned order justifies this issue.

***Point (vi)*** Penalty. Admittedly, there was a query from the officers of Bangalore Service Tax Commissionerate; further, for similar services rendered to IBM and Cap Gemini, service tax has been paid under this category. Nothing prevented the appellant from seeking any clarification from the jurisdictional authorities. The failure is glaring, and not expected from such hi-tech companies. Findings in paragraph 13.5 of the Commissioner's order refers. From the foregoing submissions, it will be seen that there is no confusion on the taxability. Hence, the penalty imposed is justifiable.

A comparative chart showing the various staff-specific clauses in the agreements entered by the appellant with TCS/Infosys is enclosed to substantiate that these are only for supply of manpower.

7. The learned special counsel prays that the appeal be rejected and makes the following additional submissions:-

(1) The contention of the appellant is that they rendered the service as consulting engineers, falling under clause (31) of section 65 of the Finance Act, 1994, in the field of software development by rendering technical assistance to their clients, and during the period covered in the proceedings, services rendered in the field of software development did not attract service tax. In support of this contention, reference was made to the various clauses in the agreements between the appellant and Tata Consultancy Services, (TCS), and Infosys Technologies, (Infosys). It was further submitted that with effect from the department has also registered the services under IT Software service. A copy of the Task Order dated 3.7.2006 from Infosys was submitted during the re- hearing to buttress the stand of the appellant, that the services were rendered as technical assistance, in the field of software. Since the practice in the

industry was to charge on man-hour basis, the same practice was adopted and because of adoption of this mode for charging the clients, it was not correct to hold the service rendered as amounting to mere 'Man Power Supply' and charge service tax accordingly. The distinction between the obligations borne by a man power supply agency and those rendering technical assistance was also highlighted.

(2) In reply, the learned special counsel pointed out that nowhere in the agreements between the appellant and TCS/INFOSYS, there is any reference or assignment of any project or issue or any problem allocated or even identified, requiring the appellant to render any technical assistance in the field of software design, programme, maintenance etc. Without any idea of the project, the appellant could not have rendered technical assistance in the field of software. Attention of the Hon'ble Bench was drawn to clause 3(a) in the agreement with TCS, wherein, it is mentioned that the project to be allocated. Similarly, in respect of the agreement with Infosys, as per clause 1 (g), the Task Order will only define the scope of service assigned to the appellant. Only a blank Task Order has been filed in the appeal paper book. Hence, on the dates agreement was entered, no specific task in the field of software has been assigned to the appellant.

(3) However, during the re-hearing on 07.01.10, the counsel for the appellant submitted a copy of the Task Order dated 3.7.2006. It was pointed out that for the first time, such document was being filed and that too, during the re-hearing proceedings, and the same cannot be admitted. It was further pointed out that clause 1 h of the agreement with Infosys, mandates that the Task Order will, amongst the minimum, specify the terms of the Task order, detailed description of the services covered by the Task order and the charges for the services covered by the Task order. The copy of the Task Order submitted at the time of re-hearing does not contain the charges to be charged. This Task Order contains the name of the resource person, thereby confirming the stand of the Revenue that the entire agreement, both with TCS and Infosys are staff specific. If the appellant were to execute any software related work, nature/ description of the job should have predominantly figured in the agreements, whereas, they talk of only the staff and staff related issues. If the appellant were to render technical assistance, there was no need to mention the name of the resource persons, as is found in the invoices.

(4) Various clauses in both the agreements were referred in support of the Revenue's contention. On a query from the Bench whether a 'firm' is not included in the definition of Consulting Engineers Service from 01.05.2006, and whether the qualification of the individual employees mattered, it was clarified that since the appellant, as a firm, has not been assigned the task of rendering any technical assistance, a reference was made to the qualification of the staff supplied by the appellant. The MBAs, CAs, and M.ScS supplied by the appellant do not fall in the category of engineers, much less professional engineers, to get covered under the category of 'consulting engineers'.

(5) It was further submitted that a consulting engineer renders the 'consultation, advice or technical assistance' as a **service**, and reliance was placed on the judgment of the Principal Bench of CESTAT reported in 2007 (5) STR 281 (Tri - Del.) - para 19. If the appellant has executed the work himself, as claimed, then also, the services rendered do not fall in the category of 'consulting engineers service'. No consultant would work under the directions and control of another person, whereas, the staff supplied by the appellant were to perform the work under the control, guidance, and overall supervision of TCS/ INFOSYS Team Leaders.

(6) The department has not concluded that the service rendered fell under the category of 'man power supply' because of the mode of charging for the services rendered. With reference to the argument that the appellant was responsible for the 'deliverables', a condition not found in mere man power supply, it was submitted that the 'deliverables' in this context meant, supply of skilled man power. As per clause 4.6 of the agreement

with TCS, the employee is responsible for rectifying any defects. Similarly, the clauses (vii) and (viii) in the Task Order of Infosys state that the 'deliverables' will apply only to projects. Since no project has been assigned to the appellant, the conditions relating to 'deliverables' do not apply.

(7) Service Tax is on the service rendered. The service rendered by the appellant was confined to supply of skilled man power. It is immaterial as to what the men thus supplied ultimately turn out, at the hands of and in association with the receiver of the man power. As per the definition of 'man power recruitment or supply agency' under clause (68) of section 65 of the Finance Act, 1994, any service rendered directly or indirectly by a person to another person, in any manner for recruitment or supply of man power, temporarily or otherwise, falls in the category of 'man power supply'. The role of the appellant was just to supply the skilled man power to computer software companies, as per their requirements from time to time, and such persons so placed at the disposal of the borrowing companies, carried out the work under the control, guidance and supervision of the latter, on projects executed by the latter. The CBEC have in their circular B1/6/2005-TRU dated 27.7.2005 also clarified that such types of transactions attracted service tax under 'man power supply agency'. The scope of the service rendered has to be decided with reference to its nature at the time of execution with reference to the legal provisions applicable at the relevant time; any position prior to or subsequent to the period of providing the service is not relevant.

8. We have carefully considered the detailed submissions made from both sides. The learned senior counsel appearing for the appellants has mainly argued that the contracts executed between the appellants and their clients, namely TCS and Infosys, go to show that the obligation under these two contracts is to deliver services and not to supply manpower. To demonstrate this, he has taken us to various clauses of the agreements. Further, he submits that in terms of the agreements, for deficiency in service, the obligation is to rework and deliver the service. Further, he argues that the measurable consideration for the service provided is in terms of man hour per diem. According to him, that by itself does not indicate supply of manpower. He has also emphasized that the contracts do not provide for payment of overtime. It is the case of the appellants that they have supplied the information technology software services to their clients TCS and Infosys which were not taxable under service tax law at the material time and hence, the impugned two orders levying service tax on the appellants under the category of manpower supply service require to be set aside.

9. On the other hand, it is argued by the learned special counsel for the Department that neither TCS nor Infosys have assigned any project relating to development of any specific software to the appellants. He states that there is also no clause to this effect in the two impugned agreements. He argues that without even knowing what project the appellants have to work on, they cannot develop any software.

10. According to the learned special counsel for the Department, the appellants have only supplied skilled manpower for which payment terms have been settled on man hour basis under the impugned agreements. He states that the impugned agreements are staff specific instead of specifying any particular software project. The agreements also put the responsibility for work on the individual employees concerned and not on the appellants. The agreements also indicate that the appellants will only provide assistance and there is no indication they will execute any software project.

11. The learned special counsel further points out that the manpower supplied have to work under the guidance and control of TCS and Infosys. The appellants have no mandate to execute any work independently as normally a consulting engineer would do. He also brings it to our notice that if a person leaves, the appellants are required to provide suitable substitute. This indicates that the appellants are responsible only for

supplying manpower, and they are not responsible for completion of any software project per se.

12. We find that the arguments advanced on behalf of the appellants are mainly based on the various clauses in the agreements executed between them and their clients namely TCS and Infosys. We are of the view that not only the wordings of these clauses are to be considered but also how different clauses of the contracts actually operate have to be seen. We find that the appellants are supplying various skilled personnel to TCS and Infosys to work on software projects undertaken by TCS and Infosys from their respective clients. The personnel deputed by the appellants appear to be working at the site of the clients of TCS and Infosys or in the premises of TCS and Infosys. There is no evidence produced before us to indicate that any of the software projects undertaken by TCS and Infosys from their respective clients has been sub-contracted to the appellants or that the appellants are working on any such project on their own. What has emerged clearly is that the appellants have deputed skilled personnel including computer engineers to work under the supervision and control of TCS and Infosys personnel in-charge of projects undertaken by TCS and Infosys. The appellants are getting paid in terms of the man hours for the persons deputed to work under the control and supervision of TCS and Infosys.

13. No doubt there are clauses relating to deliverables and quality of work in the contracts but these by themselves do not indicate that the appellants are providing information technology software services to TCS and Infosys. Any person or organization obtaining skilled personnel has to ensure that such men deliver work of standard quality. No one would employ a person who is not skilled enough and no one would pay for shoddy work even if done by a skilled man. The relevant clauses in the contract in this regard on which much emphasis was sought to be put by the learned senior counsel for the appellants have to be viewed in the light that TCS and Infosys are merely seeking to obtain personnel from the appellants with necessary skill who will work diligently on the projects undertaken by TCS and Infosys.

14. The learned special counsel for the Department has rightly pointed out a significant provision in the contracts which require the appellants to replace personnel who leave the job by suitably trained personnel as substitutes. Such provisions in the contract go to show that the number of skilled persons supplied is important from the point of view of TCS and Infosys. If the appellants were actually to deliver the software projects, TCS and Infosys would have nothing to say about how in any personnel the appellants engage to complete the project or who they employ.

15. Looking at all aspects of the case and taking into account all the arguments made before us, we come to the conclusion that the appellants are only supplying skilled manpower for which they are liable to pay service tax for supply of manpower services. We note that for similar activities of the appellants in respect of two other clients namely IBM and CAP GEMINI, the appellants have paid service tax under the category 'manpower supply service' and their clients in turn took credit of such service tax paid by the appellants.

16. In view of our finding as above, we confirm the demand of service tax, cess and interest and imposition of penalty under Section 76 in respect of both the appeals. As regards Appeal No. S/173/2008, we are of the view that the penalty imposed under Section 76 meets the ends of justice and hence no separate penalty under Section 78 is warranted specially keeping in view the fact that penalties under Section 76 and Section 78 have been made mutually exclusive by amendment of the law subsequently. Accordingly, we set aside the penalty imposed under Section 78.

17. In the result, Appeal No. S/173/2008 is partly allowed by setting aside the penalty imposed under Section 78 and Appeal No. ST/220/2009 is rejected.

(Pronounced in open court on 3.3.2010)

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