CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 21210 of 2016

[Arising out of Order-in-Original No. BLR-EXCUS-COM-90/2015-16 dated 18/04/2016 passed by Commissioner of Central Tax, Bangalore North, BANGALORE]

M/s NCR Corporation India Private Limited
Niton Building Palace Road Bangalore
BANGALORE
KARNATAKA
560001

Appellant(s)

VERSUS

Commissioner Of Central Tax, Bangalore North
No-59, HMT Bhawan
Ground Floor, Bellary Road
BANGALORE
KARNATAKA
560032

Respondent(s)

APPEARANCE:

Shri Prasad V. Paranjape, Advocate for the Appellant
Smt. D.S. Sangeetha, Authorized Representative for the Respondent

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

Final Order No.20108/2021

Date of Hearing: 22/12/2020
Date of Decision:19/04/2021

Per : S.S GARG

The present appeal is directed against the impugned order dated 18.04.2016 passed by the Commissioner of Service Tax whereby the

Commissioner has confirmed the following:

(i) demand the Service Tax of Rs.22,65,61,831/- on import of services as discussed at Para 3 of the notice under proviso to Section 73(1) Finance Act, 1994 and Section 73(2) of the Finance Act, 1994 on M/s NCR Corporation India Private Limited Niton Building, Palace Road, Bangalore-560001 and order recovery of the same from them.

(ii) demand the Service Tax amount of Rs.15,20,96,837/- on reimbursement of expenses on the import of services as discussed at Para 5 of the notice under proviso to Section 73(1) Finance Act, 1994 and Section 73(2) of the Finance Act, 1994

(iii) demand the Service Tax amount of Rs.5,99,09,585/- on income received in foreign currency as discussed at Para 7 of the notice under proviso to Section 73(1) Finance Act, 1994 and Section 73(2) of the Finance Act, 1994

(iv) appropriate interest, on the Service Tax quantified at (i) to (iii) above under the provision of Section 5 of the Finance Act, 1994

(V) penalty of Rs.10,000/- under Section 77(1)(a) of the Finance Act, 1994 and Rs.10,000/- under Section 77(2) of the Finance Act, 1994

(vi) penalty of Rs.43,85,68,253/- on the assessee in terms of Section 78 of the Finance Act, 1994

2. Briefly the facts of the present case are that the appellants are engaged in the manufacturing, trading and maintenance of Automated Teller Machines (ATM) and registered with the Service Tax Department for the taxable services falling in the category of Scientific and Technical Services, ATM Operation Services, Management, Maintenance or Repair Services, Works Contract Services, Renting of Immovable Property Services, Business Support Services, Erection Commissioning and Installation Services and

Maintenance and Business Consultancy Services. The appellant during the relevant period had its manufacturing facilities in India in a 100% Export Oriented Unit in Pondicherry and in another DTA Unit. Present dispute pertains to its service tax registration *inter alia* with respect to ATM maintenance services.

3. Pursuant to audit conducted by the Department, the appellant was issued a SCN dated 24.04.2012 alleging non-payment of service tax on various grounds and sought to recover the same from the appellant along with interest and penalty. The SCN proposed to demand the tax on the following grounds:

a) That during the course of internal audit of the appellant for FY 2006-07 to 2010-11, on review of financial statements for FY 2006-07, it was observed that the Company had made payments in foreign currency to some of their related parties located outside India. Such payments were classified as payment towards 'Professional Service', received in pursuit of Integrated Services Agreement (hereinafter referred to as 'the ISA') entered into by the Company with its overseas affiliates. The Authorities observed that the ISA is essentially an agreement for provision of services, and refers to the parties to agreement as 'Service Provider'/ 'Service Recipient' and payments/receipts in this regard as Consideration in lieu of Service'. Given the same, the authorities alleged that such services are taxable services, exigible to Service Tax, and were classifiable under the Service Tax category of 'Business Support Services'. Similar observations were also made in relation to similar expenses incurred during the period FY 2007-08 to 2010-11. Further, it was alleged that since such services had been received by NCR India from service providers located outside India, transaction qualified as import of services in terms of Taxation of Services (Provided from outside India and received in India) Rules, 2006. Accordingly, the appellant was liable to pay Service Tax on the same, under the Reverse Charge Mechanism. However, based on review of service tax as well as other financial records of the appellant,

it was observed that Service Tax had not been discharged on the same. Accordingly, the authorities proposed to demand service tax on import of such services during the period FY 2006-07 to 2010-11, to the tune of INR 22,65,61,831/- along with the applicable interest.

b) That on review of Balance Sheet of the Company for FY 2006-07, it was observed that the Company had incurred certain expenses in foreign exchange, categorized as 'Travel and 'Others in the balance sheet, which were related to the 'Professional Services' received under the ISA as referred to supra. As per provisions of Section 67 of the Finance Act, 1994 (hereinafter referred to as 'the Act') read with Rule 5 of the Service Tax (Determination of Value) Rules, 2006, all expenses incurred in relation to provision of main services were includible in the gross value charged for provision of such service, and thereafter, leviable to Service Tax. Accordingly, such expenses incurred are to be included in the value of service referred to supra, and chargeable to service tax under the Reverse Charge Mechanism, under the taxable category of Business Support Services. Similar observation was made for the period FY 2007-08 to 2010-11 as well. The Authorities proposed to demand service tax to the tune of INR 15,20,96,837/- on this account, along with the applicable interest.

c) That during the course of audit for the period FY 2006-07, on review of Balance Sheet for the said period, it was observed that the Company had reported certain receipt in foreign exchange in Schedule 12. Further, during the course of audit, the Appellant mentioned that the said receipts were in relation to transactions similar in nature as of those mentioned in the ISA. Based on the same, it can be construed that the said payments were received against provision of taxable services by the Appellant. Further, even though the amounts received by the Company were denominated in foreign exchange, there was no conclusive proof to substantiate that the same are related to export of services, i.e. it could not be deduced that services were provided to service recipients located outside India. Therefore, in absence of sufficient evidence in this regard, the services were construed to be provided within India, and were accordingly exigible to Service tax.

The authorities proposed to demand Service Tax to the tune of INR 5,99,09,585/- on this account, along with the applicable interest.

d) Further, it was proposed to invoke extended period of limitation alleging wilful suppression of facts by the Appellant. It was alleged that the Appellant had not disclosed the details relating to foreign currency payments made and received during FY 2006-07 to 2010-11 in the service tax returns filed, nor has the Appellant informed the Service tax authorities of the same in any other way.

e) The SCN proposed to impose penalty under Section 76 of the Finance Act, 1994 for non-payment of Service Tax as per the provisions of the Service Tax legislation.

f) Penalty under Section 77 of the Finance Act, 1994 was proposed to be imposed on account of non-availability of registration for services provided and received by the Company i.e. Business Support Services, and failure to disclose details relating to the aforementioned during the period FY 2006-07 to 2010-11.

g) Penalty under Section 78 of the Act was also proposed to be levied on account of wilful suppression of facts by the Appellant.

3.1. The appellant filed detailed reply to the SCN and after following the due process vide Order-in-Original dated 18.04.2016 the learned Commissioner of Central Excise, Bangalore has confirmed the entire demand raised in the SCN along with interest and equal amount of penalty under Section 78. Aggrieved by the impugned order, the appellant filed the present appeal.

4. Heard both the parties and perused the records of the case.

5. Learned Counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts, the law and the binding judicial precedents. He further submitted that in the present case following three issues are involved

which are enumerated below:

i. Whether the Appellant is liable to pay service tax for Group Company cross charge received from its overseas group company, under BSS category?

ii. Whether the Appellant is liable to pay service tax on travel reimbursement paid to its own employees for their overseas business travel? And whether the Appellant is liable to pay service charge on third party vendor cross charge received from the overseas group companies?

iii. Whether the Appellant is liable to pay service tax on employee-cost charged received from its overseas group companies?

6. With regard to first issue as to whether the appellant is liable to pay service tax for Group Company cross charge received from its overseas company under BSS category, learned Counsel for the appellant submitted that the Appellant is a part of a group which consists of several group companies located in various countries. The Appellant is 99.99% owned subsidiary of NCR International Inc. USA which in turn is wholly owned subsidiary of NCR Corporation USA. He further submitted that the overseas entity of the Appellant which administers and controls the operations of its various group companies including the Appellant incurs certain expenses for running its own business and as per the income tax regulation, since those expenses are incurred by the overseas entity pertain to managing or controlling or administering the affairs of the various group companies located in various countries, the cost of the parent group company needs to be allocated in certain ratio to various group companies. As part of this process the Appellant in India also gets cross charge of expenses incurred by its parent company abroad, irrespective and without commensurate with the quantum or actual receipt or otherwise of any service from such overseas parent company.

6.1. Learned Counsel further submitted that in order to formularize this arrangement the Appellant has entered into Integrated Services Agreement

dated 01.01.1999. This agreement is standard template of agreement irrespective of actual service requested or received. He further submitted that the cross charge does not fall under the category of Support Services of Business or Commerce ('BSS') as the definition existed at least during the disputed period viz. 2006-07 to 2010-11. During the disputed period as per the definition of BSS read along with CBEC Circular F. No. 334/4/2006-TRU dated 28.02.2006 which clarifies the position with regard to Business Support Services after its amendment in the definition. Learned Counsel for the appellant also submitted that the cross charge received by the Appellant to the extent cost allocable of the parent overseas company cannot qualify as outsourced services. Outsourced services are typically low-end, executory, repetitive services such as, accounting, billing, collection, transaction processing, etc. Whereas, in the impugned order at Para 32.6 it is mentioned that the services of overseas parent company are that of higher managerial employees requiring specific business expertise and as per the learned Counsel, these services will not qualify as BSS. Learned Counsel further submitted that there is no finding whatsoever, other than mere assertion made in the impugned order before classifying these services as BSS. It can be seen from the definition of BSS that it contains various services. Neither the SCN nor the OIO clarifies how the services for which cross charge is received will qualify as Business Support Service. It is settled principle in law that the onus to prove taxability is on the revenue. He further submitted that that there was a significant amendment in the definition of BSS with effect from 01.05.2011 and the said amendment was clarified in the CBEC Circular F. No. 334/3/2011-TRU dated 28.02.2011 as under:

> *5.1 The scope of the service is **being expanded** to include operational or administrative assistance of any kind. The scope will cover all support activities for others on a contract or fee, that are ongoing business support functions that businesses and organizations commonly do for themselves but sometimes find it economical or otherwise worthwhile to outsource.*
>
> *5.2 The words "operational and administrative assistance" have wide*

connotation and can include certain services already taxed under any other head of more specific description. The correct classification will continue to be governed by Section 65A.

6.2. It is his further submission that even if it is assumed that under Integrated Services Agreement, the parent company provides any operational or administrative assistance to the Appellant, the same shall be taxable only with effect from 01.05.2011 and not prior to that. It is settled principle in law that when the scope of a taxable definition is expanded it will have only prospective effect hence the learned Counsel submitted that the confirmation of demand under BSS for the period prior to 01.05.2011 is not sustainable.

7. As far as the second issue as to whether the appellant is liable to pay service tax on travel reimbursement paid to its own employees for their overseas business travel and whether the appellant is liable to pay service charge on third party vendor cross charged received from the overseas group companies, the learned Counsel submitted that the expenses incurred in foreign currency which are reimbursed by the appellant relates to its own employees for their travel and ancillary cost incurred by them when they travelled abroad for business purposes but the adjudicating authority has wrongly recorded that these expenses are reimbursed to their overseas companies. It is his further submission that service tax under Section 66A of the Finance Act, 1994 can apply only when the appellant has received any service for its business whereas in this case, it is the employees who travelled abroad had to incur travel and other ancillary expenses which were reimbursed by the appellant. These services, if at all, are consumed by the employees when they travelled abroad in foreign countries such as hotel stay, local taxi, restaurant etc. In that case, these services are received in India and hence cannot be taxed in the hand of the appellant under Section 66A of the Finance Act, 1994. He further submitted that in this category, the Revenue has also included certain reimbursement made by the appellant to overseas group company towards 3rd party vendors costs engaged at a group level or costs of technical or engineering employees providing IT support and other operational assistance to the Appellant. He further

submitted that these are mere pooling of costs to pay to a common vendor or operational or administrative assistance services received and hence not liable to be taxed as BSS for the same reasons stated overleaf. In support of non-taxability of all the above services due to cost sharing nature or in the nature of operational and administrative assistance taxable with effect from 01.05.2011, the Appellant refers to and relies upon the following decisions:

a) *Reliance ADA Group Pvt. Ltd. vs Commissioner of S.T., Mumbai-IV, 2016 (43) STR 372 (Tri-Mumbai) (page no. 9 of compilation)*

b) *Historic Resort Hotels (Pvt.) Ltd. vs Commissioner of C. Ex., Jaipur-II, 2018 (9) GSTL 422 (Tri-Del.) (page no. 16 of compilation)*

c) *HT Media Ltd vs Commissioner of Service Tax, New Delhi, 2017 (7) GSTL 364 (Tri-Del.) (page no. 18 of compilation)*

7.1. As far as the third issue as to whether the appellant is liable to pay service tax on employee-cost cross charged to its overseas group companies, the learned Counsel submitted that the appellant receives cross charge from its overseas group company, at times, the Appellant also cross charges its overseas group company towards its employee-cost, for which payment is received in foreign exchange. Since these are only cross charge of the Appellant's employee's cost allocable to certain services performed by them for the overseas group company, this will not qualify as Business Support Service during the relevant period. Further learned Counsel submitted that even if it is assumed that this will qualify as taxable service of Business Support Service as held in the impugned order, in the present case since the recipient of such service is abroad and consideration is received in foreign exchange and the services are in relation to the business located outside India of overseas companies, this shall qualify as export of service in the hands of the Appellant and not liable to service tax in view of the settled law in the following decisions :

a) *Vodafone Essar Cellular Ltd. vs Commissioner of C. Ex., Pune-III, 2013 (31) S.T.R. 738 (Tri. – Mumbai) (page no.22 of compilation)*

b) *Verizon Communication India Pvt. Ltd. vs Asstt. Commr., S.T., Delhi-III 2018 (8) G.S.T.L. 32 (Del.) (page no. 25 of compilation)*

c) *The Commissioner of Service Tax vs Reliance Money Express Ltd., 2017 (10) TMI 853 - Bombay High Court (page no. 34 of compilation)*

7.2. Learned Counsel also submitted that being liable to pay service tax on its output services, the services on which demand is raised under first two categories, would have been eligible to them as credit which would have reduced their tax payment in cash during the relevant period. The situation being revenue neutral, the service tax demand itself should not survive. For this submission, he relied upon the following decisions:

a) *Commr. of C. Ex. & Cus. (Appeals), Ahmedabad v. Narayan Polyplasts, 2005 (179) E.L.T. 20 (S.C.) (page no. 38 of compilation)*

b) *Commissioner of C. Ex. & Cus., Vadodara vs Narmada Chematur Pharmaceuticals Ltd., 2005 (179) ELT 276 (SC) (page no. 39 of compilation)*

c) *Commissioner of C. Ex., Pune vs Coca-Cola India Pvt. Ltd., 2007 (213) E.L.T. 490 (S.C.) (page no. 40 of compilation)*

d) *Commr. of C. Ex. & Cus., Vadodara-II vs Indeos ABS Limited, 2010 (254) E.L.T. 628 (Guj.) (page no. 41 of compilation)*

7.3. Learned Counsel also submitted that the confirmation of demand by invoking the extended period of limitation is not sustainable as there has not been any suppression of material facts with intent to evade payment of duty. He further submitted that for the half-year October 2006 to March 2007, the appellant had filed the return on 18.04.2007 and hence the SCN issued on 24.04.2012 is beyond even the extended period of 5 years and thus not sustainable in law. Learned Counsel further submitted that the appellant have been subjected to various audits from time to time and the appellants have submitted the details of foreign exchange expenses including Integrated Services Agreement with the Revenue and the Revenue was in the know of these transactions all the times and therefore the appellant cannot be charged with the suppression or wilful mis-statement and hence the demand for the extended period is not sustainable in the present case. He also submitted that considering the situation revenue neutral, the charge

of suppression will not be sustainable against the Appellant as the Appellant themselves were eligible for credit on these services, the demand alleging suppression, etc. for invoking of extended period and levy of penalties will not be sustainable. For this submission the appellant has relied upon the following decisions:

a) *Jet Airways (I) Ltd. vs Commissioner of Service Tax, Mumbai, 2016 (44) STR 465 (Tri-Mumbai).*
Affirmed by Supreme Court - 2017 (7) G.S.T.L. J35 (S.C.)
(page no. 42 of compilation)

b) *ABB Ltd vs C.C.E. & S.T. LTU Bangalore, 2019 (24) G.S.T.L. 55 (Tri. Bang.) (page no. 48 of compilation)*

c) *Goldman Sachs Services vs Commissioner of Central Tax, Bengaluru East, 2020 (10) TMI 292 - CESTAT Bangalore (page no. 53 of compilation)*

d) *Vedanta Ltd. Vs CCE, Tirunveli, 2019 (28) GSTL 258 (Tri – Chennai) (page no. 66 of compilation)*

e) *Asmitha Microfin Ltd. Vs Commr. of Cus., C. Ex. & S.T., Hyderabad-III, 2020 (33) GSTL 250 (Tri – Hyd.) (page no. 70 of compilation)*

7.4. Learned Counsel also produced the copies of submissions made before the audit team in order to substantiate that they had disclosed expenditure in foreign exchange including existence of Incorporated Service Agreement and further in order to prove the point of revenue neutrality, the appellant seeks to place on record the information extracted from the returns filed for the financial year 2009-10 and 2010-11 which showed that the appellant during these years had made service tax payment of Rs.34 crores (Approximately) in cash after utilizing the available CENVAT credit. He further submitted that the cash payments made during the entire period of dispute are in excess of the present demand under reverse charge basis which was available as credit to the appellant and this fact proves that indeed the appellant was revenue neutral hence the demand raised invoking the extended period of limitation and levy of penalties are not sustainable. The appellant has also produced on record specimen expenditure reimbursement claims of one of its employees along with appointment letter issued to the said employee in order to prove that foreign expenditure booked under the category of travel, is not towards the reimbursement

made to any overseas group entity or any employee of the overseas group entity. Learned Counsel also submitted that the impugned SCN demanding the service tax under Business Support Service category does not bring on record as to how the purported services are covered under Business Support Service category and specifically covered under which limb of the Business Support Service definition. He further submitted that the onus to prove taxability is on the Revenue and without putting the Appellant to specific notice, mere vague allegations and confirmation thereof are not sustainable in law because the SCN is the foundation of litigation and needs to put the Appellant to specific notice. For this submission, he relied upon the following decisions:

a) *CCE, Bangalore vs Brindavan Beverages - 2007 (213) E.L.T. 487 (S.C.)*

b) *Union of India vs Garware Nylons Ltd., 1996 (87) E.L.T. 12 (S.C.)*

7.5. Learned Counsel also submitted that after 1st May 2011, the appellant had started paying service tax under the taxable "Business Support Services" on cross charge payments made to the overseas entity on account of employee's costs or third party vendor costs, under reverse charge mechanism and the revenue has accepted the same.

8. On the other hand, learned AR strongly opposed grant of any relief to the appellant and submitted that the findings recorded in the impugned order are detailed, legal and proper. She took us through the relevant findings recorded in the Order-in-Original and attempted to distinguish the judgments relied upon by the appellant and persuaded us to dismiss the appeal and uphold the finding of the learned Commissioner. She also filed written submission and as per her written submission the activity carried on by the appellant will be covered under Business Support Service. She further submitted that the appellant, NCR India, is a separate legal entity and being part of the Group Company does not absolve the appellant of the responsibilities of the company as a separate legal entity subject to compliances as per the laws of the land. She also submitted that Integrated Services Agreement very clearly establishes that the party whoever provides

the service is a service provider and who ever received the services is service receiver and in the present case, there is a service provider and service receiver relationship between the appellant and its foreign entities. She further submitted that the agreement does not indicate any single party receiving any service and the cost is further divided among the parties to the agreement. She further reiterated the findings recorded by the Commissioner in Paras 32.4, 32.5 & 32.6 and also Paras 35.2, 35.3, 35.4 & 35.6 of the impugned order.

9. After hearing both sides at considerable length, considering their submissions and perusing Clauses of Integrated Services Agreement and various case laws relied upon by both the parties, we proposed to discuss below all the three issues involved in the case one by one:

i. Whether the Appellant is liable to pay service tax for Group Company cross charge received from its overseas group company, under BSS category?

ii. Whether the Appellant is liable to pay service tax on travel reimbursement paid to its own employees for their overseas business travel? And whether the Appellant is liable to pay service charge on third party vendor cross charge received from the overseas group companies?

iii. Whether the Appellant is liable to pay service tax on employee-cost charged received from its overseas group companies?

9.1. Before we discuss the main issues involved, it is pertinent to reproduce the relevant definition of Business Support Services as provided in Section 65(104c) which is reproduced herein below:

> *"support services of business or commerce" means services provided in relation to business or commerce and includes evaluation of prospective customer, telemarketing, processing of purchase orders and fulfillment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, [operational or administrative assistance in any manner], formulation of customer service and pricing policies, infrastructural support services and other*

transaction processing.

Explanation- For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security;]

9.2. It is also relevant to reproduce the relevant Circular No.334/4/2006/TRU dated 28.02.2006 and Circular No. 334/3/2011/TRU dated 28.02.2011:

***3.13. "Business Support Services:** Business entities outsource a number of services for use in business or commerce. These services include transaction processing, routine administration or accountancy, customer relationship management and tele-marketing. There are also business entities which provide infrastructural support such as providing instant offices along with secretarial assistance known as "Business Centre Services". It is proposed to tax all such outsourced services. If these services are provided on behalf of a person, they are already taxed under Business Auxiliary Service. Definition of support services of business or commerce gives indicative list of outsourced services."*

Business Support Service [Section 65(105)(zzzq)]:

5.1 The scope of the service is being expanded to include operational or administrative assistance of any kind. The scope will cover all support activities for others on a contract or fee, that are ongoing business support functions that businesses and organizations commonly do for themselves but sometimes find it economical or otherwise worthwhile to outsource.

5.2. The words "operational and administrative assistance" have wide connotation and can include certain services already taxed under any other head of more specific description. The correction classification will continue to be governed by Section 65A.

10. Now, coming to the issue number one, we find that as far as this issue is concerned, as per the Department, the appellant has incurred expenditure in foreign exchange towards professional services shown by them in the balance sheet which is liable to service tax under Business Support Service. The learned Commissioner in Para 32.6 of the impugned Order-in-Original has provided the reasoning that there is a lack of expertise and efficiencies of centralization in the local countries and hence the appellant has received the professional services from their overseas holding company. Further, as per the Department, the appellant has received professional service on the

basis of the Integrated Services Agreement which tantamount the outsourcing of export services liable to service tax under the category of Business Support Service. On the other hand, the stand of the appellant from the very beginning is that the foreign exchange payments made to overseas affiliates are towards reimbursement on salary cost and other overheads by managerial personnel of NCR overseas group companies, working for NCR group as a whole. Further, as per the appellant, the relationship of service provider and service recipient is missing as per the agreement between the parties.

10.1. We have gone through various clauses of the agreement and we find that in the agreement the nature of services is not specifically mentioned but it provides sharing of cost incurred by the service providers in providing the services. Here it is relevant to reproduce the relevant Para of Integrated Services Agreement relating to cost sharing which is contained in Para 2B of the Agreement and reproduced herein below:

> *"b. Because the Service Recipients directly benefit from the Services, the Fees will include a share of the total costs incurred by the Service Providers in providing the Services, which is proportionate to the benefits each Service Recipient receives from the Service. Additionally, a reasonable mark-up over cost will be included in the Fees to the extent required under internationally-accepted arm's-length standards relating to the charging of services between related parties. The Fees for each Service Recipient will be calculated according to methodologies provided in Appendix A."*

10.2. Further, we find that as per the various Circulars cited supra issued by the Service Tax authorities, which specifies that for a transaction to liable to service tax under the category of Business Support Service, an element of outsourcing must be present but in the disputed transactions, the essential element of outsourcing is missing, hence it cannot be brought under the category of Business Support Service during the relevant period. Further, we find that Business Support Service include a wide array of activities and the SCN does not classify the activity under which it proposed to tax the services received by the appellant. In this regard, we may refer to the decision of the Apex Court in the case of Commissioner of Central Excise Vs Brindavan

Beverages (cited supra) wherein in Para 10 the Apex Court has observed as under

> *" there is no allegation of the respondents being parties to any arrangement. In any event, no material in that regard was placed on record. The show cause notice is the foundation on which the department has to build up its case. If the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice".*

10.3. Further, we find that the Commissioner in passing the impugned order has grossly erred in basing its decision on the nomenclature of the Agreement. In fact, the essence of the Integrated Services Agreement is to share expenses incurred by the NCR group as a whole, in relation to the cost incurred by the NCR group as a whole. We also note that TRU Circular No.334/4/2006 dated 28.02.2006 cited supra has clarified that services comprising of outsourcing activities are to be taxed under the Business Support Service. Further, we also find that the definition of Business Support Service was amended w.e.f. 01.05.2011 to include "operational or administrative assistance in any manner". Hence, the services in relation to operational and administrative assistance can only be taxed post the said amendment and not before that. Here, we note that learned Commissioner in the impugned order has wrongly held that the said inclusion was only clarificatory in nature and hence chargeable to service tax retrospectively. We note that the said amendment was brought about by TRU Circular No.334/3/2011 dated 28.02.2011 and relevant extract of the said Circular is reproduced above. It appears to us that learned Commissioner has not properly appreciated the intent of the legislation during the disputed period and has confirmed the demand based on the reasoning and understanding which is not inconsonance with the provision of the law during the disputed period. We also find that the Tribunal in the case of Reliance ADA Group Pvt. Ltd. (cited supra) by the appellant, the Division Bench of the Tribunal has held that cost sharing agreement between the group entities are not subject to service tax prior to 01.05.2011.

10.4 In view of our discussion above, we are of the opinion that even if it is assumed that under the Integrated Services Agreement, the foreign company is providing any operational or administrative assistance to the appellant, then the same shall be taxable only w.e.f. 01.05.2011 and not prior to that. It is settled principle in law that when the scope of the taxable service is expanded, it will have only prospective effect. Further, it is not disputed that w.e.f. 01.05.2011, the appellant is paying the service tax under the category of Business Support Service hence the confirmation of demand under the Business Support Service for the disputed period is not sustainable in law and therefore we decide this issue in favour of the appellant.

10.5 As far as Part A of issue number two is concerned, the learned AR relied upon the findings recorded in Paras 35.2, 35.3, & 35.4 of the impugned order and submitted that travel expenses have been incurred in relation to the provision of Business Support Service. The learned Commissioner in the impugned order has held that these travel expenses were paid by the appellant in foreign exchange and, in fact, reimbursement sought by the overseas affiliates in relation to the services provided to NCR India pursuant to the Integrated Services Agreement whereas on the other hand, the stand of the appellant from the very beginning is that these expenses are incurred in relation to travel cost like hotel stay expenditure, cab charges, food and boarding charges, air travel expenses etc. incurred by the employees of the NCR India and are, thereafter, reimbursed by the appellant as part of the travel expense claims of the employees. In this regard, we find that the appellant from the very beginning i.e. at the time of filing submissions against various audit inquiries from time to time, in its reply to the SCN issued by the respondent has highlighted that the said foreign exchange expenses have been incurred on account of employees of NCR India who frequently travel abroad for official purposes for the growth and promotion of the business of the appellant. The appellant also submitted documentary evidence by providing the expense reimbursement statements

filed by the employees for travel expenses incurred while travelling abroad but the learned Commissioner in utter disregard of the submissions and documentary evidence has held that expenses are relating to the Integrated Services Agreement charges remitted to overseas affiliates. Further, we find that the learned Commissioner has not discussed the grounds and documents relied upon for such finding in the impugned order. The appellant has also produced before us expense reimbursement statements and employee agreement which are encloses as Annexure-A and tagged with the Appeal paper book and the same were not considered by the learned Commissioner.

10.6 In view of our discussion above, we hold that travel expenses incurred by the employees of the appellant were not incurred in relation to Integrated Services Agreement. These services are never received in India and hence cannot be taxed in the hands of the appellant under Section 66A of the Finance Act, 1994.

10.7. Now coming to Part B of issue number two which relates to whether the expenses incurred under the category of "Others" would be liable to service tax or not? It is to be noted that the Department has proposed to tax such other expenses by holding that same have been incurred pursuant to Integrated Services Agreement entered into by the appellant and accordingly, by virtue of Section 5(1) of the Variation Rules, shall be includable in the value of such professional services received under the Integrated Services Agreement. On the other hand, the stand of the appellant from the very beginning when audit took place in 2004-05 was that these other expenses incurred in foreign exchange represent cost sharing expenses relating to certain functional points of a specific nature. Integrated Services Agreement charges and such other expenses are similar in the sense that Integrated Services Agreement charge represents the cost sharing with receipt, salary of employees whereas other expenses represents the cost shared in relation to certain other functional areas, hence the appellant submitted that all the submissions made in relation to Integrated

Services Agreement expenses cross charged to the company are equally applicable to other expenses as well. Learned Counsel, in respect of his submission of non-taxability has relied upon the decision in the case of Reliance ADA Group Pvt. Ltd. and Historic Resort Hotels (Pvt.) Ltd. vs CCE (cited supra) and submitted that the ratio of the said decisions are applicable in the present case. After considering the submissions of both the parties on this issue and perusal of the material on record, we find that these other expenses represents cost shared in relation to certain specific services from such third party vendor such as pay roll or online monitoring of ATM operations of the appellant. We also find from the documentary evidences furnished by the appellant that these other expenses are independent of the Integrated Services Agreement charges and hence not includable in the value for the purpose of demand of service tax liability. We also find that appellants submitted documentary evidence viz. copy of foreign exchange expenditure and explanation for each sub-category to the audit party and as well as to the learned Commissioner but the same were not considered while confirming liability vide the impugned Order-in-Original. Here we again reiterate the ratio of Reliance ADA Pvt. Ltd. (cited supra) wherein it has been held that cost sharing nature or operational and administrative assistance is taxable w.e.f. 01.05.2011 and not prior to that.

10.8 In view of our discussion above, we hold that other expenses incurred which are in the nature of reimbursement made by the appellant to overseas Group Company towards third party vendor cost engaged at the group level are not liable to be taxed as Business Support Service for the same reasons as held in the findings on issue number one above. Hence, this issue is also decided against the Revenue.

11. Coming to the third issue, mainly whether the appellant is liable to pay service tax on employee cost cross charged to its overseas Group companies or not? Learned Commissioner in the impugned order has confirmed the demand on the ground that foreign currency receipt classified under the head “Income from Support Services” in the balance sheet of the company is

towards professional services provided by the NCR India to other NCR group entities under the Integrated Services Agreement. Whereas on the other hand, the stand of the appellant is that appellant has cross charged its overseas Group Company towards its employee cost, for which payment is received in foreign exchange. As per the appellant, the activities undertaken by the appellant for the group entities located outside India are mainly by way of advice, consultancy or technical assistance in relation to financial management, HRD, marketing management, production management etc. Further, the appellant submitted that assuming but not admitting that the transaction clarifies as provision of service, then the company shall be eligible to claim exemption from payment of service tax as per the provisions of Export of Service Rules 2005. After examining the stand taken by both the parties and perusal of the material on record, we find that the appellant has provided various services to its group entities located outside India and has cross charged its overseas Group Company towards its employee cost which cannot be construed as provision of service and hence cannot be taxed under Business Support Service as sought to be done by the learned Commissioner. Further, we find that even if these services i.e. Business Support Service are considered taxable, the same would qualify as export of service under Rule 3(i)(iii) of Export of Service Rules 2005 because as per the Export of Service Rules, taxable services shall be deemed to be provided outside India, if the service recipient is located outside India and consideration is received in convertible foreign exchange. In the Present case, we are of the opinion that both the conditions are fulfilled hence the services rendered by the appellant cannot be taxed under Business Support Service and the ratio of the decisions relied upon by the appellant cited supra are squarely applicable to the facts of the case hence considering from both angles, the appellant cannot be taxed under Business Support Service and this issue is also decided in favour of the appellant.

12. Coming to the issue of limitation, we find that the Department has invoked the extended period of limitation to confirm the demand on the ground that the appellant has suppressed the material information from the Department so as to evade the payment of tax and further the learned

Commissioner in the impugned order at para 32.2 observed that the audit was conducted for the period 2006-07 in February 2007 to June 2007 and balance sheet was released only in September 2007 and hence the audit party was not provided with the balance sheet in June 2007 and further the copy of the agreement and relevant information were provided to the Department only in 2010 during the course of audit and the show-cause notice was issued in April 2012 which is clearly within the period of limitation. The stand of the appellant is that they have been subjected to various audits from time to time and during the audit, the appellants have submitted the details of foreign exchange expenses including the Integrated Service Agreement to the Revenue and the Revenue was fully aware of these transactions all the times and there after the appellant cannot be charged with suppression or wilful misstatement and confirming the demand by invoking the extended period. While perusal of the material on record, we find that various audits of the records of the appellant were conducted by the Department from time to time wherein all the three issues involved in the present case were raised and the appellant submitted the explanation of each of the audit objection and there after nothing was done to issue the show-cause notice. Further we find that the appellant has also produced the reply to the audit objection for the period April 2004 to December 2005 vide Exhibit 1 dated 05/04/2006 whereby the appellant has informed the Department that foreign remittances are not paid for any services rendered to NCR India and is purely an expenses sharing process as required by the US law and also mandated by transfer pricing rules which have become applicable in India under Indian Income Tax law and the copy of the Integrated Service Agreement was also provided during the audit in the month of April 2006 itself whereas the learned Commissioner in the order has noted that the copy of the agreement was provided in 2010. We also find that for the period January 2006 to March 2007, appellant was also subjected to service tax audit during the financial year 2007-08 and appellant received the audit enquiry dated 20/06/2007 based on review of balance sheet for the period 2005-06 and appellant filed reply vide its letter dated 28/06/2007 clarifying that the expenses in relation to professional services were in the nature of cross charges or reimbursements sought by

overseas entity for the time spent by managerial personnel of NCR group towards management of NCR India. Thereafter again the appellant were subjected to tax audit for the period 2007-08 to 2010-11 and audit enquiry dated 18/04/2012 was issued raising the same objection as was done during the earlier audits and the appellant clarified again that the expenses incurred in relation to professional services in relation to foreign exchange payment made and received and also submitted the copies of the sample invoices. Since after taking the clarification from the appellant, the Department was aware of the services received by the appellant from outside India as well as services provided by the appellant as early as June 2007 and all the information and the documents were provided by the appellant to the Department during the course of audit /along with reply to audit enquiry. Hence the Department cannot allege wilful suppression of facts. Further we also find that during the audit, appellant had submitted its financial statements and the copy of ISA as documentary support and there after no issue was raised by the Department pursuant to such audit during the saidperiod. Further we find that extended period of limitation under Section 73(1) of the Finance Act can only be invoked if the service tax has not been paid by a person by reason of fraud, collusion, wilful misstatement or suppression of facts or contravention of any provision of act or the rules made thereunder with intent to evade payment of service tax. Further we find that in the present case, the appellant has not suppressed facts from the Department and the during the audit they have provided all the information and the records and after the audit for the earlier period, no show-cause notice was issued and it is only on 24/04/2012, show-cause notice was issued invoking the extended period without bringing on record any material to show that extended period of limitation under Section 73(1) of the Finance Act can be invoked. We also find that the appellant has submitted return for the half year October 2006 to March 2007 on 18/04/2007 and the show-cause notice was issued on 24/04/2012 which is beyond even the extended period of 5 years and hence not sustainable in law. We also find that in the case of Continental Foundation Jt. Venture Vs. CCE, Chandigarh-I [2007(216) ELT 177 (SC)], the Hon'ble Apex Court has held in para 10 as under:-

> ***10.*** *The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.*

13. We also find that the respondent has erred in passing the impugned order without considering that the demand raised is revenue neutral as service tax paid under reverse charge would be available as CENVAT credit to the appellant. the appellant has also relied upon the decision in the case of Hindustan Zinc Ltd. Vs. CCE, Jaipur-II [2008(232) ELT 687] wherein the tax demand was held to be unsustainable as the entire exercise was revenue neutral. Further in the case of P.P. Patel & Co. Vs. CCE & Cus., Vadodara-I 2009(136) ELT 320] wherein it has been held that whatever duty was being paid by the appellant has been availed as credit by the second unit. As such, the entire situation is revenue neutral and the appellant does not get benefited by adopting lower assessable value for the purpose of payment of duty. Accordingly, the appeals were decided in favour of the assessee. Further we find that in order to prove the revenue neutral situation, appellant produced on record, the information extracted from the returns filed before the financial year 2009-10 and 2010-11 which demonstrate that the appellant during these years had made service tax payment of Rs.34 crores (approx) in cash after utilizing the available CENVAT credit and the statement (Exhibit 3) has also been produced on record. We also find that the cash payments made during the entire period of dispute are in excess of the present demand under reverse charge basis which was available as credit to the appellant and this clearly proves that the situation is indeed revenue neutral and therefore the demand raised by invoking extended period of limitation and levy of penalty is not sustainable in law. In view of

our discussion above, we are of the considered view that the invocation of extended period of limitation in the present case is wrong and not sustainable and we set aside the demand being barred by limitation. This issue is decided against the respondent.

14. In view of the discussion above, we set aside the impugned order on merit as well as on limitation and allow the appeal of the appellant.

(Order pronounced in the open court on 19/04/2021)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

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