M/S Volkswagen India (Pvt.) Ltd vs Commissioner Of Central Excise, Pune-I on 25 May, 2013

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO. I

Appeal No. ST/277/11 & ST/496 & 862/12

(Arising out of Order-in-Original No. PI/Commr/ST/15/2011 dated 25.1.2011 and No. PI/Com

For approval and signature:

Hon ble Shri P.R. Chandrasekharan, Member (Technical)
Hon ble Shri Anil Choudhary, Member (Judicial)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : No

2. Whether it should be released under Rule 27 of the CESTAT (in any authoritative report or not? : Yes

3. Whether their Lordships wish to see the fair copy of the order? : Seen

4. Whether order is to be circulated to the Departmental authorities? : Yes

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M/s Volkswagen India (Pvt.) Ltd.
Appellant

Vs.

Commissioner of Central Excise, Pune-I
Respondent

Appearance:
Shri Prasad Paranjape, Advocate
for Appellant

Shri P.N. Das, Commissioner (AR)
for Respondent

CORAM:

SHRI P.R. CHANDRASEKHARAN, MEMBER (TECHNICAL)
SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

Date of Hearing: 25.05.2013

Date of Decision: .2013

ORDER NO.

Per: Anil Choudhary

The appellant, M/s Volkswagen India (Pvt.) Ltd., have filed these appeals challenging the levy of Service Tax on reverse charge basis in respect of certain employees working in it, who were earlier working in its foreign holding company or Group Company and have been assigned under the group s policy to work in the appellant company. The appellant have challenged the following Orders-in-Original as per tabled below: -

Appeal No. Order-in-Original No. & Date Service Tax demand Period ST/277/11 PI/Commr/ST/15/ 2011 dated 25.1.11 7,31,38,617/-

May, 2007 to December, 2009 ST/496/12 PI/Commr/ST/18/ 2012 dated 17.4.12 4,73,54,828/-

January, 2010 to Dec. 2010 ST/862/12 28/RKS/ST/P-I/ 2012 dated 21.9.12 4,23,15,581/-

January, 2011 to Dec. 2011

2. The brief facts of the case are that the appellant is a manufacture of passenger vehicles and is registered under the provisions of Central Excise Act, 1944 and Finance Act, 1994 having Service Tax registration number AACCV4229PST002 for various taxable services like, Management or Business Consultant s Service, Consulting Engineer s Service, etc. etc. 2.1 Due to nature of the business, the appellant requires people with specialized skill and experience and accordingly, the appellant employed many foreign nationals (called as Global employees), who were previously employed with other Group Entity and entered into an Inter Company Employment Agreement dated 16.8.2008 (Annexure-B) between the appellant and its holding company namely Volkswagen AG, a company registered in Germany, which facilitates employment of personnel from other group companies to facilitate the business and operation of the appellant. The said personnel are relieved by the other group company and are put at the disposal of the appellant and they function as whole time employees of the appellant - Indian company and work solely under the control, direction or supervision of the appellant in accordance with its policies, rules and guidelines generally applicable to the employees of the appellant company during the period of such employment. The terms, conditions and place of employment of such global employee and their designation is in accordance with the terms and conditions agreed between Indian company and the respective global employee. It is further provided in para 2.1 of the agreement that the employment of such global employee

shall be in his personal capacity only and not for and on behalf of the foreign company. The appellant also have a right to promote/discipline/suspend/take any action/terminate the services of such global employee at any point of time in accordance with its applicable policies without seeking any permission from the foreign company. Further, the other group company/foreign company will not have any obligation towards the appellant with regard to the performance of the global employee nor the foreign company shall enjoy any right, title to or interest in or be responsible for the work of global employee or assume any risk for the results produced from the work performed by the global employees while under employment with the appellant. Further, it is provided that during the period of employment with the appellant, the holding company shall not in any way interfere with the working and or the terms and conditions of such employee nor such employee shall be subject to any instruction or control of the foreign holding company. It is further provided that the salary (including other entitlements) of such global employee shall be the liability of, and decided and paid by the Indian company i.e. the appellant based on its policies and guidelines. Also, in case of default by the appellant, the foreign/global company will not be liable towards such global employee. It is further provided that if the foreign/global company makes any payment to any third party (salary etc.) in the home country of the global employee on behalf of the Indian company, the foreign company will be entitled to be reimbursed by the Indian company to the extent of such payment.

2.2 It is further provided in para 2.6 of the agreement that the foreign company will not be under any obligation to replace any of the global employees in the event the employment of any of the global employees is terminated by the global employee or the Indian company, for any reason, nor the foreign company is responsible for any loss or damage caused to the appellant or any action of such global employee. In para 2.10, it is further provided that the agreement does not create any service provider and client relationship between the foreign company and the appellant nor it would be construed that the foreign company is providing any type of services with regard to employment of the global employees with the appellant. It is further made clear that there is no direct or indirect consideration/charges (in cash or kind) payable by the Indian company to the foreign company or the vice versa in this connection.

2.3 Further, a copy of separate agreement with one individual global employee is also placed on record (Annexure-A) wherein the Remuneration clause is as follows: -

> REMUNERATION 2.1 Salary Your remuneration will be paid as follows: -
>
> (i) Part of your net salary will be paid by the company into your valid account in Germany (through the disbursing agent, (VW AG) at the end of each calendar month.
>
> (ii) The balance part of your net salary as mutually agreed upon between you and company will be paid by the company into your valid account in India at the end of each calendar month.

Details of your remuneration will be communicated to you separately. Your salary to be paid to Germany as above, would be paid subject to approvals as may be required under the Indian exchange control regulations. The gross remuneration is subject to statutory withholdings/Indian

income taxes, as applicable.

2.2 Individual Income Tax The company shall deduct the applicable individual income tax payable at source and make payment of the same. The company shall furnish you with necessary certificates and any other documents evidencing the payment of this tax to the authorities as may be required by law.

You will provide the necessary Power of Attorney to Company nominated person to represent before the relevant tax authorities during and after the employment with the company. 2.4 Further such global employees have been assisted in obtaining Visa and Work-Permit by the appellant. The Visa clause of the agreement shows that such global employees are in the control and disposal and also command of the appellant and there is employer-employee relationship between them.

2.4 The Revenue treating the aforementioned arrangement as supply of manpower by the foreign holding company to the appellant, issued show-cause notice as to why: -

> (a) Service Tax under the reverse charge method on manpower recruitment or supply agency services received from foreign companies should not be demanded and recovered from them under the provisions of Section 73(1) of the Finance Act, 1994.
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> (b) Interest at appropriate rate should not be charged and recovered from them under the provisions of Section 75 of the Act.
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> (c) Penalty should not be imposed on them under Section 76 of the Act.
>
> (d) Penalty should not be imposed on them under Section 77 of the Act.

2.5 The appellant have replied to show-cause notice and contested the proposed demands, but the same were confirmed and penalties were imposed under Sections 76 and 77 of the Finance Act, 1994. Interest was also demanded under the provisions of Section 75 of the Act. Being aggrieved of the orders, the appellant is before this Tribunal in appeal.

3. The learned Counsel for the appellant submits that there is no supply of labour or manpower, and/or recruitment service provided by its holding company of the appellant. As per the requirement and request of the appellant, for skilled personnel, the holding company facilitates in identifying such foreign personnel, who are then employed by the appellant under separate agreement with each employee as aforementioned. Such global employees worked under the control and supervision of the appellant as its employee. Salary for such work done by the global employees is directly paid by the appellant and such income earned by the global employees is taxable as salary under the provisions of Income Tax Act, 1961. Further, the appellant deducts Income Tax at source from the salary of such global employee of the appellant as per the provisions of the Income Tax Act. The appellant has also issued the necessary TDS (Form 16A) certificate in the capacity of employer.

3.1 Further, a part of the salary of such global employees was remitted abroad in their home country, the same was done using the services of the holding company or other group companies as applicable and such amounts were reimbursed to the other company. It is further contended that apart from the part salary of the global employees (by way of reimbursement), the appellant have not paid any amount to their holding/foreign company. Merely because a part of the salary of such global employee was paid in their home country through the holding/foreign company, it cannot be said that the foreign/holding company rendered supply of manpower or labour to the appellant. He also placed reliance on the decision of the Tribunal in the case of ITC Ltd. Vs. Commissioner of Service Tax, New Delhi 2012-TIOL-855-CESTAT-DEL and Paramount Communication Ltd. Vs. Commissioner of Central Excise, Jaipur 2013-TIOL-37-CESTAT-DEL in support of his contentions.

3.2 It is further contended that the holding /foreign company is not a manpower recruitment or supply agency service as required under Section 65(105)(k) of the Finance Act, 1994. Further, reliance is placed on CBE&C Circular No. 96/7/2007-ST dated 23.8.2007, wherein it has been clarified that in the case of supply of manpower, individuals are contractually employed by the manpower recruitment or supply agency. The agency agrees for use of the services of an individual, employed by him, to another person, for a consideration. Employer-employee relationship in such case exists between the agency and the individual and not between the individual and the person who uses the services of the individual.

4. The learned Commissioner (AR) appearing for the Revenue reiterates the findings of the adjudicating authority. It is his contention that the Indian entity should have paid full salary directly to the employee of the appellant company other than routing a part through the foreign/holding company. It is also the contention of the Revenue that after a period of 3-4 years such global employees go back to the foreign/holding company and even during the intervening period, during the employment in the appellant company, the social security liability has been discharged in their home country. Accordingly, he submits that the transaction is one of supply of labour/manpower by the foreign company to the appellant Indian company. Accordingly, he pleads for upholding the Order-in-Original.

5. We have carefully considered the submissions made by both sides and also perused the entire company agreements (Annexure-B) as well as the clauses of agreement with the global employee (Annexure-A).

5.1 In view of the clauses of agreements noticed herein above and other facts, we hold that the global employees working under the appellant are working as their employees and having employee-employer relationship. It is further held that there is no supply of manpower service rendered to the appellant by the foreign/holding company. The method of disbursement of salary cannot determine the nature of transaction.

5.2 Further, in view of the rulings relied upon by the appellant as aforementioned, we find that the facts are covered on all four corners and accordingly, the appeals are allowed and Orders-in-Original are set aside.

6. Thus, appeals are allowed with consequential relief, if any.

(Pronounced in Court on)

(P.R. Chandrasekharan)
Member (Technical)

(Anil Choudhary)
Member (Judicial)

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