

THE AUTHORITY FOR ADVANCE RULINGS
(Central Excise, Customs & Service Tax)
NEW DELHI

6th Day of November, 2015

Ruling No. AAR/ST/13/2015

in

Application No. AAR/44/ST/2/2014

PRESENT

Justice V.S. Sirpurkar, Chairman
Shri S.S. Rana, Member (T)
Shri R.S. Shukla, Member (L)

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Name & address of the applicant : M/s. North American Coal Corporation
India Pvt. Ltd., Pune

Commissioner concerned : Commissioner of Central Excise,
Pune-III, ICE House, 41-A, Sassoon
Road, Opp. Wadia College,
Pune- 411001.

Present for the applicant : Shri Kumar Visalaksh, Advocate

Present for the Department : Shri Govind Krishna Dixit,
Departmental Representative

RULING

(By Sirpurkar J)

The applicant is a subsidiary of their American Company which can be referred to as National NAC, US. The applicant shall be referred to hereinafter as NAC, India. They claim to be the surface mining activity specialist. We need not go into their assertion about ability.

2. The NAC, India has employed one employee namely Steve R. Sloan. Now, in fact this employee is on the permanent roll of the NAC, US, however, his

services were required by the Indian company for its activities. There is an agreement between the Indian company i.e. NAC, India and Shri Sloan, which agreement is on record and being relied upon by the applicant company. This is a tripartite agreement between NAC, US, NAC, India and Mr. Sloan. Under this agreement, the services of Mr. Sloan were to be utilized by NAC, India for a particular term. It is apparent from the agreement that so long as Mr. Sloan serves in India, all his salaries are to be paid by the Indian company i.e. NAC, India. It is also provided in the agreement that even when Mr. Sloan stays in India and serves NAC, India his social security interests shall be taken care of by the American company. There does not, however, appear to be any agreement at least for the present that the social security interests taken care of by NAC, India are in any manner reimbursed by the NAC, India to NAC, US. The application and more particularly the statement of facts made by the applicant suggests that this arrangement is going on for quite some time and in the past these services were treated to be the manpower services and were taxed under the service tax regime as it then existed. In the past regime, there was a specific Entry No. Section 65(68) read with Section 65 (105)(k). However, after 2012 and after the advent of the Negative List, all those entries have gone into the oblivion and now there is a fresh definition of service under Section 65 (44). The applicant relies on the definition of service and more particularly on the exclusion provision which is under Section 65 (44)(b), which suggests that a provision of service by an employee to the employer in the course of or in relation to his employment shall not be included in the definition of service.

3. The whole thrust of the learned counsel Shri Kumar Visalaksh is on this provision and he points out that since Mr. Sloan is providing the service to the applicant in his capacity as an employee which is clear from the wordings of the agreement, there is no question of any service tax provision being applicable to the salary paid by NAC, India to Mr. Sloan.

4. In our opinion, the contention is absolutely correct. We will have to go by the definition of service and if the definition of service excludes the service offered by an employee to the employer then it has to be so held. For interpreting this clause then we can not go to the past entries available prior to 2012 and can not interpret this clause on the basis of that Entries that will be against the canons of interpretation. As if this is not sufficient, then we look at the agreement which is appended with the application. The agreement is very clear to suggest that so long as Mr. Sloan is serving in India, he will be treated to be the employee of the applicant though his interests as the employee of NAC, US, insofar as the social security interests are concerned, will be taken care of by NAC, US. It is trite that he does not get the salary from NAC, US when he is offering services to NAC, India in that behalf, the benefits are mutually exclusive, at least so far as, they are concerned with the salary. The only obligation on NAC, US is regarding the social securities which are not reimbursed by NAC, India to NAC, US. The learned counsel is prepared to go on record and we record his statement that there is no such reimbursement regarding the social security borne by NAC, US in respect of Mr Steve R. Sloan

5. Once this position is correct there can be no question of attracting the service tax for the salary paid to Mr. Sloan.

6. Shri Dixit, the Departmental Representative very vehemently and earnestly urges that as a matter of fact where the NAC, US is bearing the social security this social security amounts to a consideration paid by the NAC, India for employing the services of Mr. Sloan and, therefore, this will not amount to a pure service as contemplated in Section 65 (44)(b). We are afraid this contention is incorrect merely because the social security of Mr. Sloan while he is in India is being taken care of by the NAC, US. The service of Mr. Sloan with NAC, India can not be viewed otherwise in view of the clear language of Section 65 (44) (b).

7. One Reserve Bank circular was tried to be relied upon by Shri Dixit. However, that circular has no application as the notes appended to that circular relate not to the present period but the pre-amendment period. This is apart from the fact that the Reserve Bank of India's circular will have no bearing and will be irrelevant insofar as the interpretation of the services is concerned.

8. We, therefore, allow this application and answer the question put forth in the application in the negative, in the sense that there shall be no liability to pay service tax on the salary and the allowances payable by the applicant to the employee in terms of the dual employment agreement and such salary will not be eligible to levy the service tax as per the provisions of the Finance Act. With this, we dispose of the application.

Sd/-
(S.S. Rana)
Member (T)

Sd/-
(V.S. Sirpurkar)
Chairman

Sd/-
(R.S. Shukla)
Member (L)