CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/2730/2010-DB

[Arising out of Order-in-Original No. 82/2010 dated 22/11/2010 passed by the Commissioner of Central Tax, Bangalore North]

Philips Electronics India Ltd.
Philips Innovation Campus,
Manyata Tech Park, Nagavara,
Bangalore - 560 045

Appellant(s)

Versus

Commissioner of Central Tax,
Bangalore North
No.59, HMT Bhawan
Ground Floor, Bellary Road
Bangalore – 560 032
Karnataka

Respondent(s)

Appearance:

Mr. Prasad Paranjape, Advocate
and Mr. Mohit Raval, Advocate
PDS Legal, Advocate (M)
20th Floor, Express Tower,
Nariman Point,
Mumbai – 400 021
Maharashtra

For the Appellant

Mr. Rama Holla, Supdt. (AR)

For the Respondent

Date of Hearing: 25/09/2019
Date of Decision: 03/12/2019

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

Final Order No. 21199 / 2019

Per : P. ANJANI KUMAR

The appellants, Philips Electronics India Ltd. are a 100% EOU (Software Technology Park Unit) are engaged in developing and export of software. No part of the output services are rendered to any client in India. The appellants have entered into various agreements with their group companies in Netherlands to avail various services, *inter alia,* wide area network/global network (WAN/PGN) services which in the nature of providing internet connection and communication. Revenue alleges that this is a taxable service under "Online Information Database Access and Retrieval (OIDAR service)". The appellants have also received Maintenance or Repair Services in respect of software/computers under AMC from foreign service providers, which were provided by service providers from outside India. The appellants also received some services which are in the nature of Commercial Training or Coaching. They have also availed Management Consultancy Services. Revenue has issued a show-cause notice dated 19/03/2009 demanding service tax of Rs. 6,71,95,540/- (Rupees Six Crore Seventy One Lakhs Ninety Five Thousand Five Hundred and Forty only). The show-cause notice was adjudicated, vide order No. 82/2010 dated 22/11/2010, by Commissioner of Service Tax, Bangalore wherein an amount of Rs. 5,70,20,902/- (Rupees Five Crore Seventy Lakhs Twenty Thousand Nine Hundred and Two only) of service tax was confirmed for the period 01/01/2005 to 30/09/2008. He also imposed penalties under Section 76 & 77 of the Finance Act, 1994.

2. Learned counsel for the appellant submits in respect of OIDAR services that the taxable service under Section 65 (105) (zh) means any service provided or to be provided to a client by any person in

relation to OIDAR or both, in electronic form through computer network in any manner. In order to attract tax under this category, the service provider should provide data or information to a client through a computer network for some consideration; in the instant case no data or information belonging to Philips Netherlands and it does not provide any data to the appellant for consideration; Philips Netherlands provides computer infrastructure by way of network connectivity and associated services to the appellant to manage various IT requirements such as e-mail or access to own data or information; the service at best can be equated to Telecommunication Service as defined under Section 65 (109a) of Finance Act 1994; however the same is also not applicable as the appellants overseas entity is not a telegraph authority as defined under Indian Telegraph Act, 1885. He submits that Tribunal in their own case ***2019 (21) GSTL 450 (Tri.-Chennai)*** has taken a view in favour of the appellants and this Bench in the case of ***United Telecom Ltd. 2009 (14) STR 212 (Tri.-Bang.)*** has also taken similar view; CBEC Circulars 137/21/2011-ST dated 15/07/2011, 91/2/2007-ST dated 12/03/2007 and 137/21/2011-ST dated 19/12/2011 have clarified that providing interconnectivity between two points for transferring of data or its transmission is specifically covered under Telecommunication Services only w.e.f. 01/07/2007. Therefore, the appellants are not liable to pay service tax either under OIDAR or Telecommunication Service.

3. In respect of Management, Maintenance and Repair Service, learned counsel submits that these services are availed with respect to maintenance of various software used by appellants; these services are provided by the overseas entity from outside India and are in the nature of upgradation or enhancement of existing software; upgradation or enhancement of existing software was brought under service tax net only from 16/05/2008, with introduction of Information Technology Software Services; this was held by Tribunal in the case of

SAP India Pvt. Ltd. – 2011 (21) (STR) 303 (Tri.-Bang.). MMR service is covered under 65(105)(zzg) and under Rule 3(1) (ii) of Taxation of Services (provided from outside India and received in India) Rules, 2006; as the services are not provided in India they are not liable to service tax.

4. In respect of Commercial Coaching or Training Services, he submits that these services are availed by the employees of the appellant by visiting overseas locations; whenever such services are availed in India, the appellants have paid service tax and the proof of the same was demonstrated before the Commissioner; as the services are rendered outside India and the same will not be liable for service tax in the hands of the appellants.

5. Coming to the Management Consultancy Services, the learned counsel submits that these services are received by the appellants outside India and as and when these are rendered in India the appellants have paid service tax and the same was demonstrated before the Commissioner; as the services are rendered outside India and the same will not be liable for service tax in the hands of the appellants.

6. The learned counsel for the appellants further submits that in view of the CBEC Circulars 275/7/2010-CE, 8A dated 30/06/2010; 276/8/2009-CX, 8A dated 26/09/2011 and the decision in the case of ***Indian National Shipowner's Association Vs. Union of India – 2009 (13) STR 235 (HC-Bom.) [(affirmed by Hon'ble Supreme Court 2010 (17) STR J57 (SC)],*** the demand confirmed by the Commissioner for the period 18/04/2006 is not sustainable as the charging Section itself, i.e. Section 66A of the Finance Act, 1994 was introduced with effect from 18/04/2006.

7. Learned counsel also submits that there were calculation errors in the order in respect of Management, Maintenance and Repair Services. He also submits that the show-cause notice is dated 19/03/2009 and the services in disputes are secondary services used in the export of their primary services and any tax paid on this would be revenue-neutral and therefore, allegation of suppression does not hold good and extended period cannot be invoked. He also submits that learned Commissioner thought it appropriate to waive penalty under Section 78 in terms of Section 80; having accepted that the appellant had bona fide belief demand for extended period cannot sustain as held in ***Indian Institute of Chemical Technology – 2012 (26) STR 97 (AP).***

8. Learned AR for the Department reiterated the findings of the Commissioner in the OIO and submits that the services utilized by the appellants come under OIDAR; in respect of Maintenance and Repair Service, the proviso with respect to IT services came into effect from 01/03/2005. He also submits that in respect of Management, Maintenance or Repair Service and Management Consultancy Services, the appellants have not submitted proper data regarding the services availed in India and services availed abroad.

9. Heard both sides and perused the records of the case. Learned Commissioner in the OIO mainly depends on Rule 2(1)(d)(iv) of Service Tax Rules, 1994; Notification 36/2004 dated 31/12/2004 and Section 66A of Finance Act 1994 w.e.f. 18/04/2006. Learned Commissioner also relies upon the CBEC Circular 275/7/2010-CX 8A dated 30/06/2010. Regarding the OIDAR, Commissioner observes that there is a difference in the submissions of the appellant vide a written reply dated 03/11/2010 and 28/09/2010 and the submissions given during the personal hearing. However, learned Commissioner has not put forth any reasoning based on the facts of the case or the

provisions under any contract. Therefore, it is to be held that the appellant's contentions were not countered with facts and therefore nothing has been brought on record to show that the appellant's contentions are factually incorrect. On the other hand, the appellants rely on Tribunal judgment in their own case (supra). Understandably, the arrangements of working vis-a-vis the appellant and the overseas masters would not be different for different locations in India. Tribunal observed that

> *"5.3 The main take away from the definitions is that services provided should facilitate not only online information but also Database Access or Retrieval. From the facts on record, it appears to reason that the infrastructure services are nothing but a spider web group which connects Philips Netherlands to all its locations worldwide through the Wide Area Network (WAN) of internet protocol. For such Philips Global Network Services, payment is made on the basis of invoices raised by Philips Netherlands towards maintenance of server/portal, license fees, server software maintenance cost, infrastructure for global platform, hiring of web space for storing data, management and maintenance of web portal, licence cost for access for wireless WAN environment, Directory services for listing etc. Some of these services which can be availed by Philips locations and employees are of the nature of "Calendaring and Scheduling Directory, Philips e-mail, file back up etc. In any case, all these infrastructure services are only in the nature of providing intra connectivity between Philips locations worldwide and the payments made are obviously then for sharing of the maintenance cost between the Philips' units and not as fees for supply of online information or retrieval of data from the portal."*

In view of the above, we find that the appellants have a strong case in their favour. We find that the appellants are not liable to pay

any service tax regarding the OIDAR.

10. Regarding Management, Maintenance or Repair Service, appellants submitted that these are availed with respect to maintenance of various software and therefore it falls under Information Technology Services levied w.e.f. 16/05/2008 as has been held by this Bench in the case of **SAP India Pvt. Ltd**. (supra). Learned Commissioner contends that the term 'management' means running the affair in organized and systematic manner and to be able to do this efficiently and effectively, requires carrying out host of activities, functions and tasks. However, we find that learned Commissioner has failed to appreciate the fact that upgradation of software etc falls under 'Information Technology Services' as discussed above. Therefore, we are inclined to accept the contentions of the appellant.

11. Coming to the other two services i.e. Commercial Coaching or Training Services and Management Consultancy Services, the appellants have submitted that these services were mainly provided abroad and whenever they were performed in India they have discharged service tax. Learned Commissioner observed that they have not produced any sort of evidence to prove this contention. No data has been provided in the appeal papers so as to enable this Bench to come to a conclusion. Under these circumstances, we find that the issue requires to go back to the authorities to ascertain the duty liability on the appellant vis-à-vis their claims.

12. Coming to the question of penalty, we find that learned Commissioner has observed that there cannot be a *mens rea* on the part of the appellants and thus waive the penalty under Section 78. As rightly contended by the appellants, under the circumstances, extended period cannot be invoked. As we have held that no service

tax can be levied against the appellants in respect of OIDAR services and Management, Maintenance or Repair Services, the penalty levied to that extent under Section 76 & Section 77 shall have to be set aside. We find that the appellants are liable to pay service tax on Commercial Coaching Service and Management Consultancy Services rendered by the overseas agents availed in India. For the reason that the show-cause notice cannot invoke extended period, we are of the considered opinion that such liability will be restricted to normal period. Penalty under Section 76 & 77 will be levied by the original authority after re-quantifying the duty payable by the appellants in respect of Commercial Coaching Service and Management Consultancy Services for the normal period.

13. In view of the above, we set aside the impugned order and remand the case back to the original authority for the limited purpose of quantifying the service tax payable on Commercial Coaching Service and Management Consultancy Services for the normal period.

(Order Pronounced in Open Court on **03/12/2019**)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

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