(2024) 01 CESTAT CK 0002

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No.70060 Of 2020

M/S Innodata India Pvt. Ltd — APPELLANT

Vs

Commissioner Of Central Tax, GST & Central Excise, Gautam Buddh Nagar — RESPONDENT

Date of Decision : 03-01-2024

Acts Referred:
Place Of Provision Of Services Rules, 2012 — Rule 2(1), 2(q), 3, 9, 9(b)
Service Tax Rules, 1994 — Rule 6A, 6A(d)
Finance Act, 1994 — Section 65B(44), 65(49), 65(75), 65(104c), 65(105)(zh), 66B, 66(D)(b), 66F(A), 73(1), 75, 78, 78(A)

Citation : (2024) 01 CESTAT CK 0002

Hon'ble Judges : P.K. Choudhary, Member (J);Sanjiv Srivastava, Member (T)

Bench : Division Bench

Advocate : Abhinav Kalra, Sandeep Pandey

Final Decision : Allowed

Judgement

P.K. Choudhary, Member (J)

1. The issue involved in this appeal is whether the Appellant herein is liable to pay service tax under the head 'Online Database Access and Retrievable (OIDAR) Services during the period from July 2012 to November 2016. The service tax demand of Rs. 50,87,71,481/- has been confirmed under section 73(1) of Finance Act, 1994 (the Act for short) alongwith interest under Section 75 of the Act and penalty of Rs. 50,87,71,481/-under Section 78 of the Act vide Adjudication Order dated 11.11.2019 passed by the Commissioner, Central Goods & Service Tax, Greater Noida. A penalty of Rs. 1,00,000/- under Section 78(A) of the Act has also been imposed on Shri Rajiv Nandvani, Director and VP (Facilities) of the Appellant company by the aforesaid order dated 11.11.2019.

2. Briefly stated, the facts of the case are that the Appellant, M/s Innodata India Private Limited (formerly M/s Innodata Isogen Private Limited) ('IIPL' in short), are providing Content Support Services to its ultimate holding Company,

Innodata Inc., USA, which mainly include data conversion, knowledge process outsourcing (KPO) and IT enabled services.

3. It was noticed by the Revenue that the Appellant had taken centralized registration from the Service Tax Commissionerate, Noida vide Registration No. AAACI2425GSD002 initially at A-14-15, Sector-16, Noida and had subsequently changed their address for providing various taxable services. On perusal of the ST-3 returns filed by the Appellant, it was noticed that the taxable services being provided/exported by them had been described as 'OIDAR services' in their ST-3 returns filed upto June 2012, and from July 2012 to March 2013, the services exported were described as 'Development and supply of contents for use in Telecom services', 'Advertising agency' etc., and from April 2013 onwards the services exported were described as 'Business support services'. It appeared to the Revenue that the Appellant was exporting OIDAR services which were taxable in the hands of the service provider (the Appellant herein) in the taxable territory of India in terms of Rule 9(b) of the Place of Provision of Services Rules, 2012, and not covered within the definition of 'Export of Services' provided under Rule 6A of Service Tax Rules, 1994 for being eligible for refund/rebate of service tax paid on input services under Notification No. 39/2012-ST dated 20.06.2012, and therefore, it was alleged that the Appellant had deliberately, with an intention to evade payment of service tax, changed the classification of 'OIDAR service' to 'Business Support Service (BSS)' for the period July 2012 onwards.

4. Hence, it was alleged that the Appellant had provided OIDAR services valued at Rs.4,40,85,52,382/- to their overseas customers during the period from July 2012 to November 2016 had not paid service tax amounting to Rs. 56,93,10,544/- (including cesses) which became recoverable from them under proviso to Section 73(1) of the Act, along with interest under Section 75 of the Act and penalty under Section 78 of the Act.

5. It has been observed that the Appellant provided the following services to their customers, mainly to Innodata Inc., USA which are categorized as, -

a) Data Conversion services;

b) Knowledge Process Outsourcing (KPO); and

c) I.T. Enabled services

The nature, character and scope of the said services were ascertained from the Statement of work (SOW)/agreements to be as under:

'Data Conversion Services'

The Ld.Chartered Accountant referred to SOW dated 28.10.2010 entered between Innodata Inc., USA and Apple Inc. (Apple), a foreign business entity, which elucidates the scope of work required to be undertaken by Innodata, USA for its customer, Apple. The agreement contemplated that Innodata, USA would provide managed services that would assist third party publishers, distributors, aggregators, and authors ('Content Providers' for short) who desired to sell their content through the iBookstore but may require their content to be converted from a variety of existing formats into Apple-compliant EPUB/ePub files in order to do so.

Innodata USA outsourced the above work to the Appellant.

'Knowledge Process Outsourcing (KPO) Services'

The Ld.Chartered Accountant referred to SOW dated 01.07.2012 entered between Innodata USA and American Psychogical Association ('American PSY' for short) which provides the scope of work as below:

a) Innodata USA would provide

i) capture of bibliographic information? and abstracting and indexing of articles from serial publications, journals, books and book chapters, and conference papers/abstracts;

ii) indexing of dissertation records (long piece of writing) associated with its PsycINFO indexing and abstracting workflow project;

b) Innodata USA shall utilise American PSY's Hermes/Apollo system in processing the source materials, which shall be accessed through VPN connection;

c) The deliverables shall be saved in American PSY's Hermes/Apollo system.

The said work has to be undertaken by the Appellant for Innodata USA as per service agreement dated 10.12.2008.

'IT Enabled Services'

The Ld.Chartered Accountant referred to SOW dated 14.03.2014 entered between Innodata USA and British Standards, ('BSI' for short), which provides the scope of work as below:

BSI would like Innodata USA to perform corrections in order to fix the issues in Metadata Manager (the administration of data that describes other data) which are not in sync with the data in BSI SAP system, and as a result improve quality and consistency of content and data stored in Metadata Manager and the SCR to support successful distribution to commercial channels.

Innodata USA to execute backend script in UAT (User Acceptance Testing) environment to correct data & produce report and request BSI to verify the same; produce reports capturing the current state of the content (pre-correction) vs. the corrected state (post-correction) for bsiXML, bsiImages and sourceImages.

The said work is outsourced by Innodata USA to the Appellant.

5. Based on above observations about the work outsourced by Innodata USA to the Appellant, it was concluded that the Appellant was providing:-

i) Conversion of content from a variety of existing formats into Apple-compliant EPUB/ePub files which involves delivery of content mediated through internet/ multi-redundant data connections, and the same is essentially automated involving minimal human intervention and impossible without information technology.

ii) Processing of bibliographic information for American PSY involving title of articles, authors names, etc. indexing, abstracting, indexing dissertation records and delivery of processed information online as per SOW is mediated through internet/multi-redundant data connections and is essentially automated involving minimal human intervention and impossible without information technology.

iii) Removal of discrepancies and corrections in content metadata as per SOW comprises conversion of content format received from standard development organisation (SDO), conversion into XML format, enrichment and distribution to make the content consistent is also mediated through internet/multi-redundant data connections and is essentially automated involving minimal human intervention and impossible without information technology.

6. The Revenue finds that the following conditions are to be satisfied for a service to qualify as OIDAR service:

- Delivery is mediated through internet.

- The supply is essentially automated involving minimal human intervention and impossible without information technology.

Examples of OIDAR services are found to be as under

- Advertising on internet

- Providing cloud services (Google drive)

- Provision of e-books, movie, music, software, and other intangibles via internet (Hotstar, Amazon Prime Video)

- Providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network

- Online gaming (Steam).

It was therefore, alleged that services provided by the Appellant fall under the category of OIDAR services as both the required conditions are fulfilled in all the three segments viz., data conversion services; KPO services; and IT enabled services. The claim of the Appellant that the service provided by them are covered within the definition and scope of 'Business Support Service' from 2013-14 was found to be erroneous in view of the meaning assigned to it under Section 65(104c) of the Act as it existed before 01.07.2012, thus 'Business Support Services, means services provided in relation to business or commerce and includes evaluation of prospective customers, 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 assistance for marketing, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.

7. The Appellant claimed that the raw data/content received and data processed which was made available to the third parties through Innodata USA did not belong to the Appellant and was always the intellectual property of the content providers, and that the Appellant only provided support services to the content providers who had all the IPR/copy rights over the data for using the same as OIDAR services through internet or for personal use by the content providers. The case of the Revenue however is that ownership of data is not a prerequisite in this gamut of service being provided. In other words, to levy service tax on OIDAR services there is no such condition that the ownership of the data or content must be with the service provider.

8. The Appellant placed reliance on the decision of this Tribunal in the case of State Bank of India Vs. Commissioner of Service Tax, Mumbai-II [2015(37) STR 340 (Tri - Mumbai)], wherein SBI had entered into a contract with M/s Equant Pte. Ltd. for providing Virtual Private Network (VPN) which enabled SBI and its branches to retrieve data from the data centre maintained by the applicants in different countries abroad and demand was made under OIDAR service.

The said decision of this Tribunal was held to be inapplicable to the facts of the present case by the Adjudicating authority on the ground that individual meaning cannot be assigned to what has been written in the statute or under Rule 2(1) of the Place of Provision of Services Rules, 2012 defining OIDAR services as-

"2(1) 'Online information and database access or retrieval services' means providing data or information, retrievable or otherwise, to any person, in electronic form through computer network;".

9. Accordingly, the Commissioner, CGST, Greater Noida adjudicated the case rejecting the submissions and arguments put forth by the Appellant in his defence, demand proposed in the SCN were confirmed, penalty imposed, alongwith demand of interest. Accordingly, the present appeal has been filed before this Tribunal.

10. Heard both sides and perused the appeal records.

11. Shri Abhinav Kalra, Ld. Chartered Accountant appearing for the Appellant submits that the Appellant provides services relating to data conversion, KPO and IT enabled services. Innodata USA provides content solutions, data analytics and related services to its customers located outside India; the appellant works as a content production facility for rendering IT relating services and allied activities, and all services are exported out of India to Innodata USA.

12. Ld. CA further demonstrates that raw data/content is supplied by clients of Innodata USA to the Appellant and after execution of the work, the processed/

converted data is delivered through file transfer protocol (FTP) or secured file transfer protocol (SFTP). The ownership, intellectual property and copy rights of raw data/content before or after processing of data/content rest with the data/ content providers. When the Appellant has no right to put up the data on internet or use it in any way except working upon the same to make it more useful as a job worker/processor, there is no reason to hold that Appellant is providing the data online for access or retrieval to the customers/public and charging any fees/ consideration. Accordingly, it was submitted that the activity of the Appellant is not covered under the category of OIDAR services but is properly covered under the category of business support service. The Ld. CA relied upon the decision of this Tribunal in the case of State Bank of India Vs. Commissioner of Service Tax, Mumbai-II (supra).

13. To appreciate the facts and circumstances in the present case, we gainfully refer to the applicable legal provisions during the period of dispute.

(A) Section 66F of the Act provides principle of interpretation of specified descriptions of services or bundled services under sub-section (1) and (2) as under:-

"(1) Unless otherwise specified, reference to a service (hereinafter referred to as main service) shall not include reference to a service which is used for providing main service.

Illustration- The services by RBI, being main service within the meaning of clause (b) of section 66D, does not include any agency service provided or agreed to be provided by any bank to the RBI. Such agency service, being input service, used by RBI for providing the main service, for which the consideration by way of fee or commission or any other amount is received by the agent bank, does not get excluded from the levy of service tax by virtue of inclusion of main service in clause (b) of the negative list in section 66D and hence, such service is leviable to service tax.

(2) Where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description."

(B) 'Support services' are defined under Section 65(49) of the Act as under:

"(49) 'support services' means infrastructural, operational, administrative, logistics, marketing, or any other support of any kind comprising functions that entities carry out in ordinary course of operations themselves but may obtain as services by outsourcing from others for any reason whatsoever and shall include advertisement and promotion, construction or works contract, renting of immovable property, security, testing and analysis."

(C) Telecommunication service is defined under Rule 2(q) of Place of Provision of Services Rules, 2012 as under:

"(q) 'telecommunication service' means service of any description (including electronic mail, voice mail, data services, audio text services, video text services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images, and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic means but shall not include broadcasting services.

14. The Appellant admitted that they inadvertently classified the services of the above nature of services under the category of OIDAR services defined under Section 65(75) of the Act, as it existed prior to introduction of negative list effective from 01.07.2012, as under:

“65(75) "on-line information and data base access or retrieval" means providing data or information, retrievable or otherwise to any person, in electronic form through a computer network”. Due to misunderstanding of the above definition as if all services provided in electronic form through internet would be covered in this category, the appellant classified above IT enabled support services provided through computer network as OIDAR services.

c) It was only after introduction of Negative list from 01.07.2012 that the scope of OIDAR services as defined in the Place of Provision of Services Rules, 2012 was clarified by the CBEC in Guidance Note 5.9.5 of the Education Guide dated 20.06.2012 on Taxation of services as under:

“5.9.5 What are “Online information and database access or retrieval services”?

“Online information and database access or retrieval services” are services in relation to online information and database access or retrieval or both, in electronic form through computer network, in any manner. Thus, these services are essentially delivered over the internet or an electronic network which relies on the internet or similar network for their provision. The other important feature of these services is that they are completely automated, and require minimal human intervention.

Examples of such services are:

i) online information generated automatically by software from specific data input by the customer, such as web-based services providing trade statistics, legal and financial data, matrimonial services, social networking sites;

ii) digitized content of books and other electronic publications, subscription of online newspapers and journals, online news, flight information and weather reports;

iii) Web-based services providing access or download of digital content.

The following services will not be treated as “online information and database access or retrieval services”:

i) Sale or purchase of goods, articles etc. over the internet;

ii) Telecommunication services provided over the internet, including fax, telephony, audio conferencing, and video conferencing;

iii) A service which is rendered over the internet, such as an architectural drawing, or management consultancy through e-mail;

iv) Repair of software, or of hardware, through the internet, from a remote location;

v) Internet backbone services and internet access services."

d) The expression in the above clarification 'the other important feature of these services is that they are completely automated, and require minimal human intervention' and the exclusions proved to be crucial for reconsidering the classification of services provided by the Appellant. The scope of OIDAR services was thus limited to internet-based services whereby data or information can be accessed or retrieved on payment of specified charges by the customers/public. But when the raw data and information is digitized, abstracted, indexed and the content so digitized is transmitted to the owner of the supplier of raw data/ information through computer network for being used by them in their own use or business, then such service would be data conversion/processing, KPO/BPO or IT enabled services and fall outside the purview of OIDAR services. The same will be broadly covered within the scope of 'Support Services of business or commerce' or 'Business support services' (BSS) or telecommunication services.

15. The Appellant corrected the nomenclature of their services from OIDAR to services other than OIDAR being covered under Section 65B (44) of the Act in their service tax registration. The Appellant was in his legal right to correct the classification or broad nomenclature of services based on proper understanding as per the clarification issued by the CBEC. The allegation levelled in this regard that it cannot be changed is wholly untenable and without any reasonable and legal ground. The place of provision of service in respect of services provided by the Appellant is location of recipient of service which is outside India as per default Rule 3 and is not taxable under Section 66B of the Act, and all the condition for export of services under Rule 6A (including Rule 6A (d)) of Service Tax Rules, 1994 are fully satisfied. The Appellant does not provide OIDAR service for which place of provision was location of service provider under Rule 9 of POPS Rules, 2012, so as to attract service tax.

16. We find from the agreement between the Appellant and Innodata Inc. USA as discussed above that the Appellant is required to provide services relating to conversion of raw data and information into corrected, abstracted, indexed and digitized data to the third parties as per the agreement entered into with Innodata USA.

17. It is noted that using the internet, or some other electronic means of communication just to communicate processed data to the supplier and the owner of raw data/content does not mean that a business is providing OIDAR

services. The suppliers/owners of raw data/content have all the rights to title, intellectual property rights and copy rights over the data before and after processing/digitization of data. The Appellant has no title or ownership over the processed data for being used over the internet for their business. OIDAR services as clarified by the CBEC in the Education Guide for Taxation of services on 20.06.2012 in Guidance Note 5.9.5 covers services which are automatically delivered over the internet or an electronic network where there is minimal, or no human intervention. In practice this can be: (i) where the provision of the digital content is entirely automatic, e.g. a consumer clicks the 'By Now' button on a website and thereupon the content may be downloaded on to consumer’s device, or the consumer receives an automated e-mail containing the content, and small amount of manual process is only permitted.

18. We find that Appellant has not maintained any website or electronic network to provide services which are essentially automated or involving minimal human intervention for public in exchange for any consideration. The Appellant is providing digitized, abstracted and indexed data out of raw data received from third parties using the internet or electronic means of communication just to communicate resultant digitized or converted data, which are input services for their customers who may utilize the data for providing services under the category of OIDAR service (main service) by putting them on the internet for public/clients or for their personal use. The services rendered by appellant are therefore broadly covered under the category of Business support services or telecommunication services using tools of information technology, and shall not be covered under the category of OIDAR services.

19. We find that the instant case is wholly covered by the decision of this Tribunal in the case of State Bank of India Vs. Commissioner of Service Tax, Mumbai-II (supra) wherein SBI had entered into a contract for providing Virtual Private Network (VPN) which enabled SBI and its branches to retrieve data from the data centre maintained by the applicants in different countries abroad and demand was made under OIDAR service. This Tribunal held as under:

"The ownership of data is quite clearly with the SBI foreign offices. Equant have not provided any data for access/retrieval. They have simply enabled the connectivity. They have provided connectivity which enables the FOs to access/ retrieve data online. The responsibility of Equant is to ensure that network VPN functions properly. The commissioner has totally misread the meaning of ” services provided in relation to online information and database access or retrieval". Clearly, the service provided has to relate to information access/ retrieval. And Equant has to relate to information access/retrieval. And Equant has not provided information and database. The ownership of data is with the FOs. This is a vital fact. The Commissioner's finding that it is not necessary that the original data should emerge or originate from the provider of VPN network is an incorrect reading of section 65(75) and 65(105)(zh)".

The Ld. Commissioner in support of his observations has relied upon the decision of this Tribunal in the case of Photolibrary India Pvt. Ltd. Vs. CST [(2015) 39 STR 637 (Tri-Mum.)] wherein it was observed that:-

"The Appellant in the present case had a website containing a number of photographs which would be freely viewed but would be available for use in ad insertions etc., only on payment of the prescribed charges. The revenue had sought to levy service tax on these charges under the category of 'OIDAR' services. The assesse contested the demand on the ground that it had got a copyright in the photographs and hence amount received by it were for use of copyright and hence would be outside the purview of service tax. On appeal the Tribunal held that:

(i) The photograph could be downloaded for use in ads etc. only through computer network;

(ii) The appellant use to charge the viewer a fee for downloading the images:

(iii) The photograph contained in the website may be having a copyright but when the photograph is only available in the website for accessing and subsequent downloading, the copy right in such images becomes incidental and the main activity so far as appellant's client is concerned is making information available for retrieval.

Accordingly, the services would be liable under the category of 'OIDAR' services."

We find that the above decision cited by Ld. Commissioner is distinguishable from the decision relied upon by the Appellant on the ground that the scope of OIDAR services has been clearly brought out in the case of Photolibrary India Pvt. Ltd. (supra) and is not opposed to the decision in case of SBI (supra). The Appellant does not display the content on their website for pecuniary benefit but the processed data is made available to the owners of data/content which is used by them as inputs for providing output services to their customers. Therefore, the case law relied upon by the Appellant is not contrary to the decision cited by the Ld. Commissioner.

20. In view of our considered findings, we hold that the Appellant is not liable to service tax on the services under the category of OIDAR services.

21. As regards, the ground of limitation, we find that the Appellant was under a bona fide belief that its activity was not liable to service tax and further, the Appellant has maintained proper records of its activity and has been making compliances with various laws including Income Tax Act, Companies Act, and had been filing ST-3 returns under service tax, filing refund claims on quarterly basis in respect of service tax paid on input services used in the services exported out of India. We find that the issue in dispute involves interpretation of statute, and as such no mala fide can be attributed to the Appellant. Accordingly, we hold that extended period of limitation cannot be invoked in the facts of the present case.

22. In view of the above discussion, the impugned order cannot be sustained and

is accordingly, set aside. The appeal filed by the Appellant is allowed with consequential benefits, in accordance with law.

