
(2023) 08 CESTAT CK 0016

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No.42286 Of 2013

M/S. Intimate Fashions Pvt. Ltd

APPELLANT

Vs

Commissioner Of GST & Central Excise

RESPONDENT

Date of Decision : 01-08-2023

Acts Referred:

Finance Act, 1994 — Section 65(30), 65(33), 65(36), 65(39), 65(53a), 65(75),
65(105)(zzzze), 66A, 73(2)
Information Technology Act, 2000 — Section 2()(4), 2(1)(j), 2(1)(o), 2(1)(v)

Citation : (2023) 08 CESTAT CK 0016

Hon'ble Judges : Sulekha Beevi C.S., Member (J); M. Ajit Kumar, Member (T)

Bench : Division Bench

Advocate : S.Muthuvenkataraman, K. Komathi

Final Decision : Disposed Of

Judgement

M. Ajit Kumar, Member (T)

1. This is appeal filed by M/s. Intimate Fashions India Pvt. Ltd. (herein after also referred to as IFIPL) against Order in Original No. 7/2013 (ST) dated 17.7.2013 passed by the Commissioner of Central Excise, Chennai – III Commissionerate.

2. Brief facts are that on the basis of discreet intelligence that the appellant has not paid service tax on payments effected to foreign company, the appellant was visited by officers of Central Excise Headquarters Preventive Unit, Chennai. During the visit, it was noticed that common server was installed in the premises of M/s. Bodyline Private Limited, Sri Lanka (BPLSL). The data required for IFIPL was stored in the server installed in BPLSL and accessed by the appellant (IFIPL) through these lines. After completion of the installation, of common server and implementation of SAP in the premises of M/s. BPLSL, the said facility was rendered for use by the appellant also for accessing and retrieving data from the common server with the aid of SAP software for accounting and other purpose through private international lease lines. It appeared that this service is rightly classifiable under the category of 'Computer Network Services' / 'Online

Information and Database Access or Retrieval Service', which are liable to pay service tax on the reverse charge mechanism basis. The appellant agreed that leased line services are classifiable under 'Computer Network Services' from 2006 onwards and paid the service tax thereon. The same was duly recorded in para 11 of the SCN dated 19/10/2012 and para 9 of the impugned order. The appellant claimed that the activity relating to graphical tool, Microsoft license, SAP implementation, SAP maintenance, server depreciation, provision are classifiable under 'Information Technology Services' only with effect from 16.5.2008, when the service was introduced and not during the period 2006, 2007 and 2008 upto 16.5.2008. Hence they are not liable to pay service tax during the subject period. However, it appeared to Revenue that the entire service activity including the preparatory activity of installation of server, implementation of SAP software, graphical tool for upgradation etc. and allowing the use of the said common server and SAP software available in the premises of M/s. BPL Sri Lanka by the noticee for manipulation of data through computer network and through private international leased lines is rightly classifiable as a whole service under the category of Online Information and Data Access or Retrieval Service only. Hence a Show Cause Notice dated 19.10.2012 was issued to the appellant. The period under consideration spans from 2006 to 2009. After due process of adjudication, service tax of Rs.83,41,013/- was demanded under section 73(2) of the Finance Act, 1994 for the services classifiable under the service tax category of 'Computer Network Service' and later designated as 'Online Information and Database Access or Retrieval Service'. Aggrieved by the said order, the appellant is in appeal.

3. No cross-objection has been filed by the respondent department.

4. Shri S. Muthuvenkataraman, learned counsel appeared for the appellant and Smt. K. Komathi, learned ADC (AR) appeared for the Revenue.

5. The learned counsel Shri S. Muthuvenkataraman submitted that as per the Order in Original it has been stated that the appellant IFIPL were involved in the activity of installation of server implementation on SAP software, graphical tool for upgradation etc. and allowing the use of the said common server and SAP software available in the premises of M/s. BPLSL by the appellant for manipulation of data through computer network and through private international lease lines. He stated that SAP also known as Enterprise Resource Planning (ERP) is a centralized enterprise management system that offers various solutions. These solutions primarily fall under the category of information technology services rather than computer network services while the services falling under computer network just provide information / data and is static in nature whereas information technology software like SAP are dynamic, flexible and capable of manipulating the available data for the furtherance of a specified function. While computer network service was introduced in 2001, the 'Information Technology Services' under which their services should be classified was introduced only in 2008. As per the decision of the Hon'ble Tribunal in the

case of Dr. Lal Path Labs Pvt. Ltd. Vs. CCE, Ludhiana reported in 2006 (4) STR 527 (Tri. Del.) services that are brought under the service tax net for the first time are not liable to discharge service tax for the preceding period. Further, he also referred to the judgment of the Bangalore Bench of the Tribunal in the case of IBM India Pvt. Ltd. Vs. Commissioner of Service Tax reported in 2010 (17) STR 317 (Tri. Bang.) wherein it was held that ERP implementation falls under the category of 'Information Technology Service' only with effect from 16.5.2008. Hence they were not liable to service tax before this date and the allegations of suppression / deliberate attempt to evade duty holds no ground. Moreover, this matter has been in dispute for some time and hence the extended time limit cannot be invoked. He prayed that the impugned order may be set aside and the appeal allowed.

6. The learned ADC (AR) Smt. K. Komathi appearing for the Revenue has submitted that the appellant in this case had not only accessed the data but they also manipulated data according to their requirement and usage. However, the appellant had first received the data through the lease network lines and the manipulation of data received comes only at the next stage. Hence it is clear that the appellant has access to the data in the server installed in SAP through lease lines. Hence the amounts remitted to M/s. Bodyline in the name of charges for graphical tools, server depreciation, SAP implementation, SAP maintenance, Microsoft license etc. are nothing but charges paid in or in relation to accessing data from the server installed in Sri Lanka through the leased lines. So the charges paid towards these services are for computer network and will be correctly subject to service tax levy under 'Computer Network Services' under reverse charge mechanism as per Section 66A of the Finance Act, 1994. She hence prayed that the impugned order may be upheld.

7. We find that the main issue to be decided in this case is whether the appellant has received 'Computer Network Services' / 'Online Information and Database Access or Retrieval Service' as per the relevant periods, claimed by Revenue or 'Information Technology Service' service, provided from a remote location outside the taxable territory, as claimed the appellant.

7.1 Since there is a dispute between the appellant and the department regarding the classification of the service under two different categories, it would be useful to extract the definition of the said services below:-

Computer Network Service

1. As per section 65(30) of the Finance Act, 1994 "computer network" has the meaning assigned to it in clause (j) of sub-section (1) of section 2 of the Information Act, 2000 (21 of 2000).

1.1 As per section 2(1)(j) of the Information Technology Act, 2000, "computer network" means the inter connection of one or more computers through –

(i) the use of satellite, microwave, terrestrial line, wire, wireless or other

communication media; and

(ii) terminals or a complex consisting of two or more inter-connected computers whether or not the inter-connection is continuously maintained

For this purpose, the term 'computer' means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer system network.

Online Information and Data Base Access or retrieval Service (was introduced in the service tax net with effect from 16.07.2001 vide notification No.4/2001-ST, dated 09.07.2001)

2. As per section 65(75) of the Finance Act, 1994, as amended by Finance Act, 2008, "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.

2.1 As per section 65(36) of the Finance Act, read with section 2(1)(o) of the Information Technology Act, 2000, "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer print outs magnetic or optical storage media, punched cards, punched tapes) or stored internally on the memory of the computer."

2.2 As per section 65(33) of the Finance Act read with section 2(1)(v) of the Information Technology Act, 2000 "information" includes data, text, images, sounds, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche".

2.3 As per section 65(39) of the Finance Act read with section 2(1)(4) of the Information Technology Act, 2000, "electronic form" with reference to information means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device."

Information Technology Software Service (Clause (53a) inserted by the Finance Act, 2008, w.e.f. 16-5-2008)

3. As per section 65(53a) of the Finance Act "information technology software" means any representation of instructions, data, sound or image, including source code and object code, recorded in a machine-readable form, and capable of being manipulated or providing interactivity to a user, by means of a computer or an automatic data processing machine or any other device or equipment;

(emphasis added)

8. From the above definition, it is found that 'Computer Network Services' means the inter connection of one or more computers.

"Online Information and Data Base Access or Retrieval or both in Electronic form through Computer Network" relates to providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network. Whereas 'Information Technology Software' service covers the manipulation or interactivity provided to a user on any representation of instruction, data sound, or image including source code or object code by machines of a computer or an automatic data processing machine. It has been admitted in the Order in Original that the appellant has installed a common server and implemented SAP in the premises of BPLSL for use by the appellant for access and retrieving data from the common server with the aid of SAP software for accounting and other purposes through international lease lines. Hence it is clear that the activity rendered by the appellant is basically related to manipulation of data and not merely the inter connection of one or more computers or the access or retrieval of data. The SAP software is used for accounting and other purposes, which needs data to be entered and permits manipulation and retrieval of data. The appellant agreed that leased line services used by them which provided for a computer network, are classifiable under 'Computer Network Services' from 2006 onwards and have paid the service tax thereon, as noted earlier. This being so, the classification of the service under dispute as a computer network service is not correct. The services are correctly classifiable under 'Information Technology Software services' which have been introduced only with effect from 16.5.2008. The nature of the services are such that it can be provided online from a remote location outside the taxable territory also. The service provided from a remote location outside the taxable territory, to recipients in India would be taxable under the reverse charge mechanism.

8.1 The appellant has placed reliance of Hon'ble Bangalore Tribunal's decision in the case of IBM India (P) Ltd. Vs. CST – 2010 (17) STR 317 (Tri. Bang.) wherein it was held that ERP implementation, which the appellant asserts is equivalent to the services rendered in the present case, falls under the category of 'Information Technology Software' services only with effective from May 16, 2008. Prior to that date, it was excluded from the definition of consulting engineer service. Relevant portion is reproduced below;

"7. In the present case, the ERP implementation service is definitely for use in furtherance of business and commerce and the service under dispute is for the implementation. So, implementation of the ERP services is specifically covered under the information technology service, which was effective only from 16-5-2008. Under these circumstances, it cannot be liable to Service Tax for a period prior to that. In the present case, the entire period is prior to 16-5-2008. The appellants have clearly shown that prior to 16-5-2008, even the services rendered by the appellant were excluded from the scope of consulting engineer's

service and also the judicial pronouncements made it clear that they would not be covered under the management consultancy services. In view of these, there is no merit in the demands confirming the Service Tax of the services under the category of management consultancy services for the period prior to 16-5-2008. It should be borne in mind that the appellants have already been paying the Service Tax for ERP Planning and advice under the category of management consultancy service. Hence, the impugned orders have not merit. We set aside the same and allow the appeals with consequential relief.”

This decision was appealed against by the department in Civil Appeal No. 1703 – 05 to the Apex Court. The Apex Court, through an order dated 8.2.2010, dismissed the civil appeal while condoning the delay. Thus, the issue of ERP implementation falling under “information technology software” service has attained finality. This being so, we are unable to go along with the stand taken by the learned ADC (AR) and find that the charge made out in the impugned order does not sustain.

9. We in agreement with the judgments above to the extent that the services rendered to the appellant, sourced from abroad on which duty is payable under the reverse charge mechanism by them, is correctly covered by the definition of “information technology software” service under Section 65(53a) and as a taxable service under Section 65(105)(zzzze) of the Finance Act, 1994 which is only liable to discharge duty from 16.5.2008. It has been recorded at para 09 and 32 of the OIO that the appellant has paid the service tax due under service category ‘Information Technology Service’. We also find that the appellant has agreed that leased line services are classifiable under ‘Computer Network Services’ from 2006 onwards and has paid the service tax thereon. Since the issue has been decided on merit and the appellant having paid the dues under the correct service classifications, the question of extended time limit does not arise nor are any penalties imposable.

10. Based on the discussions we find that the disputed service to be defined under Section 65(53a), being a taxable service under Section 65(105)(zzzze) of the Finance Act, 1994 as ‘Information Technology Software’ service from 16.5.2008. We set aside the impugned order and order accordingly. The appellant is entitled to consequential relief, if any, as per law. The appeal is disposed off on the above terms.