(2020) 12 CESTAT CK 0019

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 564, 1509 Of 2012

M/s SAP India Pvt. Limited @Hash Commissioner Of Central Excise Bangalore-II

Date of Decision : 15-12-2020

Acts Referred:

Finance Act, 1994 — Section 65(47), 65(48), 65(105)(zze), 65(105)(zzzze), 66A

Citation : (2020) 12 CESTAT CK 0019

Hon'ble Judges : Anil Choudhary, J;P. Anjani kumar, Technical Member

Bench : Division Bench

Advocate : Prakash Shah, Mihir Mehta, Rama Holla

Final Decision : Allowed

Judgement

Show Cause

Notice dated","Service Tax Appeal

No.",Period,Tax demanded (Rs.),Penalty (Rs.)

16.01.2007,564 of 2012,"01.07.2003 to

31.03.2006","Nil (as rule 66A was

enacted w.e.f.

18.04.2006)",

23.10.2008,1509 of 2012,"April, 2006 to

March, 2008","79,07,67,027/-","79,07,67,027/-

(ii) Under Article 6.2. This is for support services for software which is essentially for upgradations in the software and also for fixing,,,,

technical difficulties encountered while using the software.,,,,

(iii) Under Article 3.7.2. This payment is on account of use of SAP software and third party software by appellants themselves, that is for the",,,, copies licensed for use by the appellants. The Counsel for the appellant submits that these payments can in no way be considered as,,,,

charges for franchise. Further urges, that extended period of limitation is not available in the facts and circumstances.",,,,

9. Opposing the prayer of the appellants, the authorised representative for the Revenue submits that the appellants are representing SAP, Germany, in",,,,

India. They are marketing the software in India and realizing the consideration from the clients. Out of this consideration realised, a part thereof is",,,,

remitted to SAP, Germany as â??Royaltyâ??. This payment is towards the representational right granted by SAP, Germany, to sell the software in",,,,

India and for doing the process of customization of the software for each customer. The entire activity of implementation of SAP software is a,,,,

process identified in India with SAP, Germany and the appellant is doing this process as a representative of SAP, Germany under the guidance",,,,

received by the appellant, though it is represented as consideration for licensing of the software and for cost of continuous upgradation. According to",,,,

him, the appellants are acting as a franchisee of SAP, Germany and, therefore, the impugned order confirming the service tax demand is maintainable.",,,,

He further relies on the ruling in Timken India Limited vs. CCE, Jamshedpur -2018 (11) TMI 1382- CESTAT Kolkata.",,,,

10. Having considered the rival contentions, we find that the appellant is making payment to SAP, Germany in terms of Article 6.1, 6.2 and 3.7.2 of",,,,

the agreement between them, noticed hereinabove which is payment towards license fee for use of software by the client in India for the software",,,,

developed by SAP, Germany and 3rd party database / software and also towards support services for software which is essentially for upgradation of",,,,

the software and for fixing technical difficulties encountered while using the software. Amount paid under Article 3.7.2 is for use of SAP software by,,,,

appellant itself to SAP, Germany. We find that the services squarely covered in the forecorners of the definition of Information Technology Software",,,,

Service as defined under Section 65(105)(zzzze) of the Finance Act, 1994, which was brought on statute w.e.f. 16.05.2008.",,,,

10.1 We further find that the same activity of the appellant was earlier classified under Consulting Engineer Service for the period 07.07.1997 to,,,,

27.02.1999 which was upheld by this Tribunal vide order reported as 2006 (1) STR 152, thereafter, there was exemption from March, 1999.",,,, Subsequently, for the period 16.10.1997 to 31.03.1998 the said activity was classified as Management Consultant Service which was also set aside by",,,,

this Tribunal vide Final Order dated 14.08.2006 reported at 2007 (210) ELT 64, following the earlier order classifying as Consultant Engineer Service.",,,,

11. Again vide order-in-original dated 16.06.2017 the Principal Commissioner of Service Tax, Bangaluru wherein service tax demand for the period",,,,

April, 2004 to September, 2004 and March, 2006 was proposed to be charged under â??Management Consultant Serviceâ?? and also vide another",,,,

show cause notice for April, 2006 to March, 2007, demand was proposed and also vide third show cause notice for the period April, 2007 to March,",,,,

2008, the demand was proposed, taking notice of the order of this Tribunal, was pleased to drop the demands.",,,,

11.1 Further, admittedly the appellant is paying service tax under the head Information Technology Software Service w.e.f. 16.05.2008 which is not",,,,

disputed by the Department. It is an accepted principle laid down by the Apex Court in Commissioner of Service Tax vs. Federal Bank Limited â?",,,,

2016 (42) STR 418 wherein affirming the order of the Kerala High Court that there was new head of service tax noticed and unless the same is,,,,

carved out from the existing entry, the service tax under the said head cannot be said to be exigible prior the date of its enactment under any other",,,,

existing head. Accordingly, we hold that the service in question is not taxable under the head â??franchisee serviceâ?? rather taxable under",,,,

Information Technology Software Service. Accordingly, both the appeals are allowed and the impugned orders are set aside. The appellant is entitled",,,,

to consequential benefits, in accordance with law.",,,,

(Pronounced in Court on 15/12/2020),,,,

