CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 10831 of 2017-DB

[Arising out of Order-in-Original/Appeal No AHM-EXCUS-003-APP-192-16-17 dated 04.01.2017 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD-I(Appeal)]

Avaya Global Connect **.... Appellant**

E-1/1, Electronic Estate,
GANDHINAGAR, GUJARAT-382004

VERSUS

Commissioner of Central Excise & ST, Ahmedabad **.... Respondent**

Custom House, 2nd Floor, Opp. Old Gujarat High Court, Navrangpura, Ahmedabad, Gujarat-380009

APPEARANCE :

Shri P.P. Jadeja, Consultant for the Appellant
Shri Rajesh Nathan, Assistant Commissioner, (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 16.06.2023
DATE OF DECISION: 07.07.2023

FINAL ORDER NO. 11452/2023

RAMESH NAIR :

The issue involved in the present case is that whether activation charges for activating software which is inbuilt in the telecom system of EPABX is liable to service tax under Business Auxiliary Service or otherwise when the sales tax on the same activity was discharged.

2. Shri PP Jadeja, learned Consultant appearing for the appellant at the outset submits that the same issue in the appellant's own case, only for the different period has already been decided in their favour vide this Tribunal order No. A/10004/2023 dated 04.01.2023 therefore, the issue stand settled. Hence, following the order of this Tribunal dated 04.01.2023, the present appeal deserves to be allowed.

3. Shri Rajesh Nathan, learned Assistant Commissioner, (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. We have carefully considered the submissions made by both the sides and perused the record. We find that the facts which is under dispute is that the appellant have collected activation charges in respect of telecom equipment EPABX system which was sold earlier. The case of the department is that since activation of software activity was carried out after the sale of equipment, the same is liable for service tax under Business Auxiliary Service. We find that in identical issue, only for the different period, has been decided vide order No. A/10004/2023 dated 04.01.2023. The relevant order is reproduced below:-

> **"13.** We have carefully considered the submissions of both sides and perused the records. We find that the issue to be decided before us is whether the appellant is liable to pay Service tax on "Software Activation Charges" under the taxable services of "Business Auxiliary Services".
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> **14.** We find that the whole case has been made by the Department on the basis of balance sheet which shows a separate income under head software activation charges. Appellant purchased EPABX from the foreign based vendor and further sales the same to customers. The said system contains two type of software viz. Basic System Software and feature related software. In case of feature related software, we find that the customers were intimating their needs and specific requirements to Appellant for activation of features, accordingly activation of specific function is allowed by overseas suppliers on payment of charges. Appellant collected the said charges thru their Invoices/ bills and paid the CST/Sales Tax on entire amount. After retaining profit, remaining amount is transferred by appellant to overseas vendors. In the said transaction we observed that, there is no service obligation in whole transaction. The only commercial obligation is sale of goods by appellant to customers as and when required. The appellant did not receive any commission in this matter. The appellant is not a facilitator or a service provider to customers, but is a seller to customers. Hence, a pure and simple sale/purchase transaction has been misconstrued to be a service under Section 65(19) of Finance Act 1994 by the Department in this matter. We find force in the argument of the appellant that when there is sale there will be no service.
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> **15.** We also note that the invoices raised for activation of software indicate that the Appellant has paid VAT /sales tax and as per the provisions of Section 2 (23)(d) of the Gujarat Value Added Tax Act and Section 2 (g) (iv) of the Central Sales Tax Act 1956, the said transaction of appellant covered in definition of sales of goods for the purpose of payment of VAT/CST. Further, Article 366(12) of the Constitution of India defines the expression "goods", which include all materials, commodities and articles. It is an inclusive definition. Article 366(29A)(a) deals with a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration. On the other hand, Article 366(29A)(d) deals with a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration. The question as to whether the software is goods or not came up for consideration before the Apex Court in the decision in *Tata Consultancy Services* case (supra). In that case, the Apex Court was considering the provisions of the Andhra Pradesh General Sales Tax Act, 1957. Section 2(h) of the said Act which defines "goods" as meaning, all kinds of movable property other than actionable claims, stocks, shares and securities and including all materials, articles and commodities including the goods involved in works contract etc. Section 2(n) of that Act defines a sale with all its grammatical variations and cognate expressions as meaning, every transfer of the property in goods, whether as such goods

or in any other form in pursuance of a contract or otherwise by one person to another in the course of trade or business, for cash, or for deferred payment, or for any other valuable consideration etc. The Apex Court referred to the judgments of the American Courts in the cases of *Commerce Union Bank* v. *Tidwell* - 538 S.W.2d 405; *State of Alabama* v. *Central Computer Services, Inc*., 349 So. 2d 1156; *First National Bank of Fort Worth* v. *Bob Bullock,* 584 S.W. 2d 548; *First National Bank of Springfield* v. *Deptt. of Revenue,* 421 NE 2d 175; *CompuServe, Inc*. v. *Lindley,* 535 N.E. 2D 360 and *Northeast Datacom, Inc*. v. *City of Wallingford*, 563 A2d 688 holding that computer software is intangible personal property. The Apex Court also considered many other judgments of the American Courts in *South Central Bell Telephone Co*. v. *Sidney J. Barthelemy*, 643 So. 2d 1240; *Comptroller of the Treasury* v. *Equitable Trust Co*., 464 A. 2d 248; *Chittenden Trust Co.* v. *Commr. of Taxes*, 465 A.2d 1100; *University Computing Co*. v. *Commissioner of Revenue* for *the State of Tennessee*, 677 S.W.2d 445 and *Hasbro Industries, Inc.* v. *John H. Norberg, Tax Administrator*, 487 A. 2d 124 taking a different view. In the above cases, it was held that when stored on magnetic tape, disc or computer chip, the software or set of instructions is physically manifested in machine-readable form by arranging electrons, by use of an electric current, to create either a magnetised or unmagnetised space. It was also held in those cases that by sale of the software program the incorporeal right to the software is not transferred since the copyright of the incorporeal right to software remains with the originator and what is sold is a copy of the software. It was further held that the original copyright version is not the one which operates the computer of the customer but the physical copy of that software which has been transferred to the buyer. Having referred to the above judgments, the Apex Court in paragraph-19 held as follows :-

> ***"19.*** *Thus this Court has held that the term 'goods', for the purposes of sales tax, cannot be given a narrow meaning. It has been held that properties which are capable of being abstracted, consumed and used and/or transmitted, transferred, delivered, stored or possessed, etc. are 'goods' for the purposes of sales tax. The submission of Mr. Sorabjee that this authority is not of any assistance as a software is different from electricity and that software is intellectual incorporeal property whereas electricity is not, cannot be accepted. In India the test to determine whether a property is □ goods, for purposes of sales tax, is not whether the property is tangible or intangible or incorporeal. The test is whether the item concerned is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed, etc. Admittedly in the case of software, both canned and uncanned, all of these are possible*."

While considering the expression "goods" as used in Article 366(12) of the Constitution of India, the Apex Court has further observed as follows :

> ***"27.*** *In our view, the term goods as used in Article 366(12) of the Constitution and as defined under the said Act is very wide and includes all types of movable properties, whether those properties be tangible or intangible. We are in complete agreement with the observations made by this Court in Associated Cement Companies Ltd. (supra). A software program may consist of various commands which enable the computer to perform a designated task. The copyright in that program*

may remain with the originator of the program. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes, and marketed would become goods. We see no difference between a sale of a software program on a CD/floppy disc from a sale of music on a cassette/CD or a sale of a film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just of the media which by itself has very little value. The software and the media cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media i.e. the paper or cassette or disc or CD. Thus a transaction/sale of computer software is clearly a sale of goods within the meaning of the term as defined in the said Act. The term all materials, articles and commodities includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed, etc. The software programs have all these attributes."

The law on definition of goods enunciated in *Tata Consultancy* case was quoted with approval by the Apex Court in the judgment in *Bharat Sanchar Nigam Limited and another* v. *Union of India and others*, 2006 (2) S.T.R. 161 (S.C.). The law as to whether the software is goods or not is no longer *res integra* in view of the above dictum of the Apex Court. Hence, in the impugned matter on software activation charges Appellant is not liable to pay service tax.

16. The word "software" used in the said Apex court judgment is important; software can have many forms and can be sold by way of many modes. Further, the contention of department is also not acceptable in view of the Judgment of Infosys Technologies v. C.T.O. - 2009 (233) E.L.T. 56 (Mad.) in the said matter the Hon'ble High Court has held that "if the software whether customised or non-customised satisfies the Rules as a 'goods', it will also be 'goods' for the purpose of Sales tax. Goods may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed.

17. From the above it is clear that the amount collected by the Appellant from their customers against as "activation charges" of equipment/ software features are covered under the activity of sales of goods and not covered under the provisions of "Service" as defined in the Act. Therefore, we don't find any merits in impugned order.

18. The appellant also made submissions on time-bar. We find that the appellant admittedly paid the Sales Tax/ VAT duty on the entire transaction and also issued invoice/bills to customer for the above disputed transactions. Therefore, the entire activity of appellant is very much on record. Appellant also disclosed the said transaction in their Balance Sheet. Accordingly, no suppression or mis-declaration can be attributed to the appellant for invoking extended period of demand. Accordingly, the demand for longer period is not sustainable on the ground of limitation also.

19. As per our above discussion and findings, the impugned order is set aside, appeal is allowed with consequential relief, if any, in accordance with law.**"**

5. From the above, it can be seen that the facts and legal issue are identical to the present case therefore, the ratio of the above decision in the appellant's own case is squarely applicable. Accordingly, following the above decision of this Tribunal, we set-aside the impugned order and allow the appeal.

(Pronounced in the open court on 07.07.2023*)*

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

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