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

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 572 of 2012-DB

[Arising out of Order-in-Original/Appeal No AHM-CEX-003-COM-028-030-12 dated 30.08.2012 passed by Commissioner of Central Excise-AHMEDABAD-III]

Black Box Limited **.... Appellant**

(Formerly Known As AGC Networks Limited.)
E-1/1, Gandhinagar Electronic Estate,
GANDHINAGAR, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Ahmedabad-iii **....Respondent**
Custom House, 2nd Floor, Opp. Old Gujarat High Court, Navrangpura, Ahmedabad, Gujarat-380009

APPEARANCE :

Shri P.P. Jadeja, Consultant for the Appellant
Shri Dinesh M. Prithiani, Assistant Commissioner (AR) for the Revenue.

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

DATE OF HEARING : 04.10.2022
DATE OF DECISION: 04.01.2023

FINAL ORDER NO. A/10004 / 2023

RAMESH NAIR :

The appeal is directed against Order-in-Original No. AHM-CEX-003-COM-028 to 30-12 dated 30.08.2012 passed by the Commissioner of Central Excise, Ahmedabad –III

2. Vide the impugned order, the learned adjudicating authority has confirmed a Service Tax demand along with interest thereon and imposed penalties under the Finance Act 1994. Aggrieved of the same the appellant is before us.

2.1 This is the second round of litigation and the matter had come up earlier before this Tribunal. The case was examined and the matter was remanded to the adjudicating authority for *de novo* consideration vide Order No. A/1643/WZB/AHD/2010 dated 20-09-2020.

2.2 In pursuance thereto, the impugned order has been passed. The background of the case is that the appellant was dealing in Electronic and Telecom equipment. Software are embedded in such telecom equipment systems of EPABX. On scrutiny of Balance Sheet of the Appellant it was revealed that Appellant has shown certain amount as "Software Activation" income in Schedule 14. Appellant had collected these charges from their customers in connection with after sales of goods i.e equipment/ software. Accordingly, Appellant were issued three show cause notices as to why the activity of selling of software should not be treated as taxable services under the category of " Business Auxiliary Services" under Section 65 of the Finance Act, 1994 and the Service tax should not be demanded under Section 73(1) of the Act along with interest. Since the issue involved in all three show cause notices were common these were decided by the Commissioner, Central Excise, Ahmedabad –III vide Order-In-Original dated 31.03.2008, wherein the Service tax demand was confirmed holding that Appellant are not only selling the goods of foreign vendor but are also providing after sales services, such as providing right to use certain software by activating such software so that their customers who had already purchased equipments from them could use certain additional features by getting them activated. Thus said activity is covered under business auxiliary service. Being aggrieved with Order, Appellant had filed appeal before CESTAT. Vide order dated 29.09.2010 Tribunal remanded the matter for de-novo. The matter was re-adjudicated vide the impugned order and Service Tax demands were confirmed along with interest and a penalty. Being aggrieved, appellant is before us.

3. Shri P.P. Jadeja, learned counsel appearing for the appellant submits that There is no dispute that Appellant was dealing in Electronic and Telecom equipment of various venders based in foreign countries. Software were embedded in such telecom equipment system of EPABX, thus, such software for various functions are built in respect of telecom equipment. When the purchaser/customers of equipment whishes software of specific functions to be activated, activation of such specific functions is done by Overseas suppliers on payment of charges, known as "activation charges" for "software activation". Appellant used to collect charges from customers which are shown under schedule in Appellant's Balance-Sheet and such activation charges are partly retained by Appellant and remaining amount is

transferred to Overseas vendors. The transaction involves sale of goods and Sales Tax/VAT has been paid thereon.

4. He argued that service Tax is levied when taxable service is provided by service provider to his client(s). The purchase of goods from Appellant is not a service and such customer/ buyer of goods cannot be treated as recipient of service. Appellant is not provider of service, but, only seller of goods liable to Sales Tax/VAT which is paid undisputedly. The said system sold had two types of software viz. Basic System Software & Feature Related Software. Basic System Software is pre-requisite for basic functioning of the system. Feature Related Software is additional application loaded. Both software are loaded on Control Card, but use of Feature Related Software is additionally allowed on payment of separate charges for activation of software, on Right to Use (RTU) basis. Right to use is allowed by remote activation done by the overseas supplier, as per customer's choice of features. Overseas supplier had raised invoices to Appellant for activation charges. Accordingly, Appellant had raised invoices for activation as additional charges for RTU features of software. As per the provision 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 right to use (RTU) are covered in definition of sale of goods for the purpose of payment of VAT/CST. Hence, Appellant were paying VAT/CST.

5. He further submits that a transaction of sale of software is clearly a sale of 'goods' within the meaning of the term as defined in the CST Act and Gujarat Value Added Tax Act 2003. The term "Goods" includes '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, delivered, stored, possessed etc. The software programme have all these attributes. Software may be intellectual property but such intellectual property contained in a medium which is bought and sold. It is an article of value. It is sold on activation in various forms as a marketable commodity.

6. He also submits that Goods subjected to Sales Tax cannot be treated as service rendered nor can be equated with Service Tax liability. The entire

case of Revenue is, thus, clearly erroneous and untenable on merits of the case. Revenue has demanded Service Tax on the total "Software Activation" Income shown in the Schedules of their Balance Sheet. All relevant invoices reflected the sale on payment of Sales Tax/CST. Bifurcation was not shown in invoices. With such facts, it is crystal clear that Appellant have raised invoices only for sale of goods on due sales Tax/CST. The appellant have discharged CST/VAT on total value and not even on composition scheme like Works Contract Tax (WCT). The appellant have paid VAT to State Government and CST to Central Government. They have also booked the transaction in their profit loss account as sale of goods only. Accordingly it is clear that appellant have sold goods only and no additional consideration was recovered towards any service. Revenue's case is that Appellant has provided "Business Auxiliary Service" on "Software Activation", which is not sustainable in the facts of this case and law applicable in such facts. Appellant raised invoices for Software Activation and paid VAT on the entire amount and no extra consideration towards the service was recovered, entire value recovered by appellant from their client is indeed a sale value. No amount was recovered towards the service charge. Hence the entire foundation of the Revenue's case is not sustainable in facts and law applicable in such facts. As per fact and submissions "Software Activation" on payment of CST/VAT undoubtedly is of sale of goods, which does not attract Service Tax either before 01.07.2012 and subsequent thereto. Accordingly, in the present case, activity being of "sale of goods" does not fall under activity of any "Service". He placed reliance on the following decisions

(i) M/s. Imagic Creative Pvt. Ltd. v. Commissioner of Commercial Taxes - 2008 (9) S.T.R. 337 (S.C.)

(ii) Bharat Sanchar Nigam Ltd. v. Union of India - 2006 (2) S.T.R. 161 (S.C.)

(iii) Tribunal's Final Order No. A/ 10978-10981 /2022 dt 12-08-2022

(iv) Quick Heal Technologies Ltd vs CST, New Delhi -2020(41) GSTL 467 (Tri-Del). Upheld by Hon'ble Supreme Court in 2020(41)GSTL 467 (Tri-Del)

(v) White Cliffs Hair Studio Pvt Ltd. -WP. No. 12198 of 2009 order dated 08.07.2022.

7. He, without prejudice, further submits that for calculating alleged Service Tax demand, Revenue has taken into consideration entire amount of Activation Charges received by Appellant on which CST/VAT has been paid. Had it been activity of "Business Auxiliary Service", demand could have been only on the amount retained by Appellant, which was their margin of profit, out of the amount of software activation charges recovered. Hence the computation of Service Tax demand is also incorrect.

8. He also submits that Order is beyond scope of SCN. Demand of Service Tax confirmed by giving findings which are neither specifically mentioned nor proposed in Show Cause Notice. It was necessary for Department to specify how software activation is covered under the clause of Business Auxiliary Service described in Finance Act 1994. Revenue cannot conclude a case which was not made out in show cause notice and; that Department cannot travel beyond show cause notice and that party to whom Show Cause Notice is issued must be made aware of allegations made against which is a mandatory requirement of natural justice.

9. Without prejudice, he further submits that as per Rule 2A of Service Tax (Determination of value) Rules 2006, before or after 01.07.2012, value of goods was not to be included in value of taxable service. As per Rule 2A of Rules of 2006, it is clear that in any composite service, value of goods is not to be included in value of taxable service and in case of appellant, there is no dispute that entire amount collected by appellant from buyers towards Software Activation is against sale of goods, which was considered by the revenue for purpose of demand of Service Tax. Since, entire amount is towards sale of goods, the same need to be deducted for calculating for value of Service Tax. Accordingly the receipt of sale proceedings of the goods from buyer is not taxable. He placed reliance on the decision of Intercontinental Consultants And Technocrafts Pvt Ltd.- 2018 (10) GSTL 401 (S.C).

10. He further submits that the quantum of service tax by not allowing "Cum-tax-value" is incorrect**,** even if it is held to be payable under the law. This will be in consonance of provisions under section 67(2) of Finance Act 1994 and taxable value and service tax thereon requires to be considered

accordingly. Appellant is not likely to receive any other amounts from Buyers who have made payments long back and Appellant have closed books of accounts. Therefore "Cum-tax-value", may be allowed**,** even if service tax is held to be payable**.**

11. He also submits that the demand is barred by limitation. Revenue has to prove that there is a deliberate attempt on the part of the assessee to suppress the facts from department with an intention to evade payment of service tax which is absent in present case. In the present case appellant was of bonafide belief that activity "Software Activation" is of sale on payment of CST/VAT and hence it was not liable for any service tax. Thus, this case is only of interpretation and in such case of interpretational issue, extended period can not be applied for demand of duty /tax. He placed reliance on the following Judgments:

(i) Cosmic Dye Chemical Vs. CCE, Mumbai – 1995(75)ELT -721(SC)

(ii) Tamil Nadu Housing Board – 1994(74)ELT 9(SC)

(iii) Nizam Sugar Factory – 2006(197) ELT 465(SC)

12. Shri Dinesh M. Prithiani, learned Assistant Commissioner (AR) appearing for the revenue while reiterating the findings of the adjudicating authority submits that the activity of Appellant would amount to service and liable to Service Tax and, therefore, the impugned order is sustainable in law.

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".

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.

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.

(Pronounced in the open court on 04.01.2023)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

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