IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 269 of 2011

AND

Service Tax Appeal No. 270 of 2011

(Arising out of Orders-in-Appeal No. 21 & 22/2011 (MST) dated 08.03.2011 passed by the Commissioner of Central Excise (Appeals), 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai – 600 034)

M/s. Dassault Systemes Simulia Private Limited : Appellant
(Earlier known as 'M/s. Abaqus Engineering (I) Pvt. Ltd.')
ASV Ramana Towers, 10th Floor,
37 & 38, Venkatnarayana Road,
T. Nagar, Chennai – 600 017

VERSUS

The Commissioner of Central Excise and Service Tax : Respondent
692, M.H.U. Complex, Nandanam,
Chennai – 600 034

APPEARANCE:

Ms. Shrayashree T., Learned Advocate for the Appellant

Shri M. Ambe, Learned Deputy Commissioner for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER NOs. 40193-40194 / 2023

DATE OF HEARING: 14.03.2023

DATE OF DECISION: 24.03.2023

Order : [Per Hon'ble Mr. P. Dinesha]

These appeals are filed by the assessee against the common Orders-in-Appeal No. 21 & 22/2011 (MST) dated 08.03.2011 passed by the Commissioner of Central Excise (Appeals), Chennai.

2. Brief facts, as could be gathered from the Show Cause Notices, which are relevant for our consideration, are that the appellant is engaged in the sale of software programme "Abaqus" to various customers. There was an audit conducted by officers of the Internal Audit Group of Service Tax Commissionerate, Chennai, wherein they appeared to have ascertained that the appellant's Head Office was at U.S.A., from whom they purchase the software, enter into an agreement/contract with Indian customers for maintenance and enhancement of the software sold by them and that the appellant had incurred expenditure in foreign currency towards the purchase. The Show Cause Notices reveal that the appellant offered various licence types to their customers and the revenue generated therefrom were duly reflected in their balance-sheet as Annual, Paid-up, MES and Academic and from the break-up details that were available from the appellant's balance-sheet, it was ascertained that the expenses related to Academic, Paid-Up Annual And Monthly, were related to the purchase of software and MES-ME related to maintenance, enhancement and support of the software provided by the foreign companies to the appellant.

3.1 The above facts appear to have weighed in the mind of the Revenue that the same constituted management, maintenance or repair service with effect from 10.07.2004 and that therefore, the appellant being the recipient in India was liable to pay Service Tax under reverse charge mechanism in terms of Section 66A of the Finance Act, 1994 read with Rule 2(i)(d)(iv) of the Service Tax Rules, 1994.

3.2 To quote the Show Cause Notice: -

> *"4.0 It appears that such service provided by the foreign company in respect of the software imported by the assessee falls under the category of management, maintenance or repair services with effect from 10.07.2004. As the expenses incurred by*

the assessee towards maintenance service relates to services provided by a person from a country other than India, it appears that the recipient in India is liable to pay the Service Tax under the reverse charge mechanism in terms of Section 66A of the Finance Act read with Rule 2(i)(d)(iv) of the Service Tax Rules, 1994."

3.3 This prompted the issuance of Show Cause Notices, as detailed in the table below, for which the extended period of limitation came to be invoked by alleging that the "…assessee neither intimated the Department on the expenditure incurred by them in foreign currency, indicate such amount of expenditure in their ST-3 returns or in any manner..." which, according to the Revenue, amounted to suppression of facts with intent to evade payment of Service Tax.

Sl. No.	**Show Cause Notice No.**	**Date**	**Period involved**	**OIO No. & Date**
1.	312/2009	14.08.2009	01.04.2006 to 31.03.2008	23/2010 dt. 09.03.2010
2.	417/2009	06.10.2009	2008 to 2009	24/2010 dt. 09.03.2010

4. Seriously aggrieved by the allegations and proposals in the Show Cause Notices, it appears that the appellant approached the Hon'ble High Court of Judicature at Madras and thereafter, as per the directions of the Hon'ble High Court, it appears that they chose to file detailed replies to the Show Cause Notices and the gist of their replies could be summarized as below:

4.1 The appellant are the dealers in computer software and also an authorized dealer for M/s. Abaqus Inc., U.S.A. (now known as 'DS Simulia Corp') and that they are the sole distributor and supplier of the Abaqus software in

India. The said Abaqus software was made available by them to the customer in India after such customer enters into software licence agreement with DS Simulia Corp.

4.2 They purchase the said software from the foreign company in U.S.A and enter into various types of agreements with purchasers in India, which entitle such purchasers to the Abaqus software and depending on the nature of the agreement, such purchaser would also become entitled to periodical upgrades, maintenance, enhancement and support.

4.3 When a purchase order was received from the customer, the same was forwarded by the appellant to the foreign company.

4.4 The situation was different for the period prior to May 2006 as compared to the period post May 2006. During the period prior to May 2006, all software as well as periodical upgrades, maintenance and other activities were performed through the medium of a CD, which was imported by the appellant and thereafter, sold to the customers in India.

4.5 However, post May 2006, the sale of the software in question as well as its upgrades, maintenance, enhancement and support were done through electronic downloading only. Upon receipt of such purchase order, the same was forwarded to the US company and the US company, thereafter, provided the password and the internet site address through which a customer / purchaser could receive his software, which could then be downloaded into his computer and be used later on for his own purposes.

5. In their reply, the appellant had also taken a very strong objection to the invoking of extended period claiming that the alleged expenditure in foreign currency towards purchase, etc., of Abaqus software were picked up by the audit team during the course of verification of the

appellant's balance-sheets, etc., which were all public documents; that there was no obligation on the part of the appellant to intimate the Department as to the incurring of expenditure in foreign currency and hence, the above, per se, would not constitute suppression of facts.

5.1 They have expressed their *bona fide* belief that maintenance of computer software was not liable to Service Tax as the Explanation to Section 65 (64) of the Act was introduced with effect from 01.06.2007 only.

5.2 The proposal in the Show Cause Notices was made to demand Service Tax on the basis of Section 66A *ibid.* read with Rule 2(i)(d)(iv) *ibid.,* but that Section 66A was introduced in the statute book vide the Finance Act, 2006 with effect from 18.04.2006 only.

5.3 Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 came into effect vide Notification No. 11/2006-S.T. dated 19.04.2006, which, when read in juxtaposition to Rule 3(ii) of the Rules, would indicate that the liability would arise only when the service is performed in India; that in their case, the foreign company having not performed the service of maintenance of software in India, whereas the same having been rendered/provided through internet, perhaps up to the insertion of the second proviso to the said Rule 3 (inserted with effect from 01.03.2008 vide Notification No. 06/2008-S.T. dated 01.03.2008), there would not be any Service Tax liability on them.

6. In view of the above discussions, the appellant had requested for dropping of the proposals made in the Show Cause Notices.

7.1 Both the Show Cause Notices were considered for common adjudication and the Adjudicating Authority, after going through the reply filed by the appellant, vide Order-in-Original Nos. 23 & 24/2010 dated 09.03.2010, has proceeded to confirm the demands, as proposed in the

Show Cause Notices. In the Order-in-Original, the Adjudicating Authority has accepted the appellant's contention that the Service Tax was not liable to be paid for the period up to 18.04.2006. For the subsequent period, the Adjudicating Authority has held that the service in question was rendered only in India and therefore, was covered under the first proviso to Rule 3(ii) of the Taxation of Services Rules, 2006 *ibid.* The lower authority has accepted the facts and contentions as to the supply of software by the foreign company to the customer in India, but holds that only after downloading the software could the services be said to have been used by the customer and no part of the service activity was directly provided from the foreign country through internet. In other words, according to him, the Abaqus software was very much available in India and the password and the internet site address, which are received by the appellant from the foreign company, was only forwarded within India to the customers who use such password and internet site for downloading the service.

7.2 With regard to invoking the extended period of limitation, the Adjudicating Authority has not accepted their plea for the reason that the appellant had not declared any details of the expenditure incurred by them in foreign currency in respect of the maintenance service received by them from the foreign company.

8. Aggrieved by the above order, the appellant preferred appeals before the First Appellate Authority, who vide common impugned Orders-in-Appeal has upheld the demands raised in the Order-in-Original, thereby rejecting the appeals filed by the appellant. It is against this common Orders-in-Appeal that the present appeals have been filed before this forum.

9. Heard Ms. Shrayashree T., Learned Advocate for the appellant and Shri M. Ambe, Learned Deputy Commissioner for the Revenue.

10.1.1 The Learned Advocate for the appellant would submit at the outset that there was no service received by the appellant, as alleged in the Show Cause Notices, much less any maintenance or repair service; that the appellant would only receive the password and the website address, which would be promptly forwarded to the customer, who becomes the owner of the software namely, Abaqus, and it is the customer who also receives and uses the service of maintenance and repair and thus, it only involves mere sharing of password and website address, which per se does not fall under the definition of "management, maintenance or repair" as defined under Section 65 (64) of the Finance Act, 1994.

10.1.2 She would contend that even if it is to be held that the above service is liable to Service Tax under Section 65 (64) *ibid.,* the liability would arise only from 01.03.2008 onwards as the service, if any, was provided through the internet from the foreign entity to the appellant, which was inserted by way of amendment to Rule 3(ii) to the Taxation of Services Rules, 2006, applicable with effect from 01.03.2008.

10.2 She would further contend that, in any case, even if the alleged service is treated as having been received from the foreign entity by the appellant, the same would be an input service as the same is forwarded to the customer and since the appellant pays the tax on outward supply of service, it would entitle them to claim CENVAT Credit of the same, which would make the situation revenue neutral.

10.3 The Learned Advocate would also contend that there was no fraud, suppression, etc., with regard to the non-payment of Service Tax as the only allegation by the Revenue is the non-declaration of any details of expenditure incurred by the appellant in foreign currency, which is not the requirement under Section 73(1) of the Finance Act, 1994.

11. *Per contra*, the Learned Deputy Commissioner for the Revenue placed heavy reliance on the findings of the lower authorities.

12. We have heard the rival contentions and we have also gone through the documents placed on record, including the regional support agreement.

13. After hearing both sides, we find that the issues to be decided by us are as under: -

(1) Whether the Revenue was justified in demanding Service Tax from the appellant under the category of 'management, maintenance or repair' service? ;

(2) Revenue neutrality;

(3) Whether the Revenue was correct in invoking the extended period of limitation?

14. We note that the following Sections/Rules are relevant:

15. Section 65 (64) of the Finance Act, 1994 reads as under: -

During the period from 01.05.2006 to 01.06.2007

> *"(64) "management, maintenance or repair" means any service provided by —*
>
> > *(i) any person under a contract or an agreement; or*
> >
> > *(ii) a manufacturer or any person authorised by him, in relation to, —*
> >
> > > *(a) management of properties, whether immovable or not;*
> > >
> > > *(b) maintenance or repair of properties, whether immovable or not; or*
> > >
> > > *(c) maintenance or repair including reconditioning or restoration, or servicing of any goods, excluding a motor vehicle;"*

During the period from 01.06.2007 to 16.05.2008

"(64) "management, maintenance or repair" means any service provided by —

(i) any person under a contract or an agreement; or

(ii) a manufacturer or any person authorised by him, in relation to, —

(a) management of properties, whether immovable or not;

(b) maintenance or repair of properties, whether immovable or not; or

(c) maintenance or repair including reconditioning or restoration, or servicing of any goods, excluding a motor vehicle;

Explanation. *— For the removal of doubts, it is hereby declared that for the purposes of this clause, "goods" includes computer software"*

For the period after 16.05.2008

"(64) "management, maintenance or repair" means any service provided by —

(i) any person under a contract or an agreement; or

(ii) a manufacturer or any person authorised by him, in relation to, —

(a) management of properties, whether immovable or not;

(b) maintenance or repair of properties, whether immovable or not; or

(c) maintenance or repair including reconditioning or restoration, or servicing of any goods, excluding a motor vehicle;

Explanation. *— For the removal of doubts, it is hereby declared that for the purposes of this clause, —*

(a) "goods" includes computer software;

(b) "properties" includes information technology software;"

16. Section 66A of the Act reads as under: -

"Section 66A. Charge of service tax on services received from outside India. —

(1) Where any service specified in clause (105) of section 65 is, —

(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and

(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India,

such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply :

Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply :

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the service is provided or to be provided.

(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

Explanation 1. — A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country.

Explanation 2. — Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.

[(3) The provisions of this section shall not apply with effect from such date as the Central Government may, by notification, appoint."

17. Rule 3 (ii) of the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 is reproduced below:-

> *"3. Taxable services provided from outside India and received in India.- Subject to section 66A of the Act, the taxable services provided from outside India and received in India shall, in relation to taxable services,-*
>
> *…..*
>
> *[(ii) specified in sub-clauses (a), (f), (h), (i), (j), (l), (n), (o), (w), (z), (zb), (zc), (zi), (zj), (zn), (zo), (zq), (zr), (zt), (zu), (zv), (zw), (zz), (zza), (zzc), (zzd), (zzf), (zzg), (zzi), (zzl), (zzm), (zzo), (zzt), (zzv), (zzw), (zzx), (zzy), (zzzd), (zzze), (zzzf), (zzzzg), (zzzzh), (zzzzi), (zzzzk), (zzzzl) and (zzzzo) of clause (105) of section 65 of the Act, be such services as are performed in India:]*
>
> *Provided that where such taxable service is partly performed in India, it shall be treated as performed in India and the value of such taxable service shall be determined under section 67 of the Act and the rules made thereunder;*
>
> *Provided further that where the taxable services referred to in sub-clauses (zzg), (zzh) and (zzi) of clause (105) of section 65 of the Act, are provided in relation to any goods or material or any immovable property, as the case may be, situated in India at the time of provision of service, through internet or an electronic network including a computer network or any other means, then such taxable service, whether or not performed in India, shall be treated as the taxable service performed in India;"*

The second proviso to Rule 3(ii) was inserted vide Notification No. 06/2008-S.T. dated 01.03.2008.

18. We find that the first issue, on merits, lies on a very narrow compass. It is the case of the Revenue that the software for the service of maintenance or repair was very much available in India and as and when the password and internet address was received by the appellant from the foreign company, the same was forwarded within India to the customers, for downloading the service. Admittedly, the provider of service is a foreign entity who would only upload the programme on to the website, provide the internet website address and a password for the same.

19.1 Section 66A is the charging section under reverse charge mechanism on the services provided or to be provided by a person who is not having a permanent address or usual place of business or residence in a country other than India; and received by a person having business or place of residence, in India.

19.2 Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, as the name itself indicates, shall apply for services provided from outside India and received in India, when Section 66A *ibid* is applicable. There is no difficulty for this proposition as the very Rule 3 *ibid.* starts with **"subject to Section 66A of the Act**…".

19.3 A conjoint reading of the above provisions points only to the fact that they shall apply when services are **"provided from outside India"**, and not if the services are provided by a person *in India, to any other person in India*. This follows, therefore, that both the statutory provisions would apply only when the location of the service provider is outside India and the recipient is located in India.

20.1 Further, the Adjudicating Authority has negated the claim of the appellant that it is the second proviso to Rule 3(ii) of the Taxation of Services Rules *ibid.* that would apply, by holding that the software which was supplied by the foreign company was very much available in India upon

its receipt by the appellant, which was only thereafter forwarded within India to the customers. We have seen the second proviso *supra,* which is extracted for the sake of convenience at paragraph 17 of this order, and it is the second proviso which specifically refers to the taxable services *inter alia* referred to in sub-clauses (zzg), (zzh) and (zzi) of clause (105) of Section 65 of the Act, which are provided in relation to "any goods…". It is in the second proviso that we see the reference, *inter alia*, to the service provided ***in relation to any goods****.* There is no dispute here that the software is treated as 'goods' and the alleged service albeit provided through internet, but performed in India.

20.2 Therefore, to say that the software was available in India, with the appellant and hence the provision of service was from India only, as observed by the Adjudicating Authority, runs counter to the demand of Service Tax under reverse charge mechanism within the meaning of Section 66A *ibid.* read with Rule 3 (ii) of the Taxation of Services Rules *ibid.*

21. In view of the above discussions, we are of the clear view that the appellant could not have been fastened with the Service Tax liability under management, maintenance or repair service for the reason that there is no document placed on record to negate the appellant's claim that they have not rendered any service in India and the Revenue has also not been able to place anything on record in their support to establish that the appellant had rendered nothing but management, maintenance or repair service.

22. We are not deciding the issue of revenue neutrality since the same depends on the facts of each case, as held by the Learned Larger Bench of the CESTAT in *M/s. Jay Yuhshin Ltd. v. Commissioner of Central Excise, New Delhi [2000 (119) E.L.T. 718 (Tribunal – LB)]* and the Hon'ble Apex Court in the case of *M/s. Star Industries v.*

Commissioner of Customs (Imports), Raigad [2015 (324) E.L.T. 656 (S.C.)].

23. We are also not deciding the issue insofar as it relates to invoking of extended period of limitation as the same is academic.

24. In the result, the appeals are allowed on merits, with consequential benefits, if any, as per law, as indicated above.

(Order pronounced in the open court on **24.03.2023**)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sdd