IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Service Tax Appeal No. 370 of 2012

(Arising out of Order-in-Original No. LTUC/103/2012-C dated 22.3.2012 passed by the Commissioner, LTU, Chennai)

M/s. United India Insurance Co. Ltd. **Appellant**
No. 24, Whites Road
Chennai – 600 014.

Vs.

Commissioner of GST & Central Excise **Respondent**
Chennai North Commissionerate
26/1, Mahatma Gandhi Road
Nungambakkam
Chennai – 600014.

APPEARANCE:

Shri S. Muthuvenkataraman, Advocate for the Appellant
Smt. Anandalakshmi Ganeshram, Supdt. (AR) for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. **40066 / 2023**

Date of Hearing : 15.02.2023
Date of Decision: 22.02.2023

Per M. Ajit Kumar,

1. This is an appeal filed by M/s. United India insurance Co Ltd. (UIIC) against Order-in-Original No. LTUC/103/2012-C dated 22.3.2012. We have heard Shri S Muthu Venkataraman, Advocate on behalf of the Appellant and Smt. Anandalakshmi Ganeshram, AR on behalf of Revenue.

2. The facts of the matter are that UIIC was engaged in providing services under the category of "general insurance

services" and "insurance auxiliary service" as defined under clause 55 of section 65 of the Finance Act 1994. During audit of their accounts by Revenue, it was noticed that M/s. SSP Sirius Ltd. UK (SSPSL) had provided application software technology i.e. 'Core Insurance Solution' for use in the business of UIIC. Since SSPSL was incorporated in UK and have no permanent establishment in India, the appellants was found liable to pay service tax on the service provided by SSPSL, in view of section 66A of the Finance Act 1994. Consequent to the audit objection the appellants paid an amount of Rs.58,63,413/-, as pointed out by Audit, together with interest of Rs.10,75,491/- on 4.6.2010. They subsequently sought refund of the same as they were of the view that no tax was payable on the supply even prior to the introduction of the service in the Finance Act. Revenue, not convinced by their averments have after issue of show cause notice dated 08/06/2011, confirmed the duty amount and also imposed a penalty.

3. It is the appellants case that information technology software was supplied to them electronically from abroad by SSPSL and downloaded in December 2007 prior to the introduction of the service in the Finance Act 1994, hence no tax could be levied on the subject supply. The appellant have raised the following issues in their appeal (I) whether service tax was payable on the supply of the said service even prior to its Introduction in the taxing statute; (II) Whether the extended

time limit could be invoked for the issue of SCN when the entire issue involved the interpretation of law relating to taxability and (iii) Whether in the facts and circumstances penalty is sustainable

4. The sequence / timeline of events as gathered from the order in original is that, a Master Contract was entered into between UIIC and Hewlett Packard (HP) on 31/10/2007 for providing Core Insurance Solution by HP (sub-contractor) to UIIC over a period of seven years. The core insurance application software with original media was downloaded in the system of UIIC in December 2007. Information Technology Software Service was brought under the tax net from 16/05/2008, under sub-clause (zzzze) of clause (105) of Section 65 of the Finance Act, 1994. There after a series of activities have been performed and finally, a contract for the right to use the software, that is End User License Agreement (EULA) was entered into on 27/05/2008, with an earlier effective date as 01/01/2008. The Proof of Concept (POC) was signed by UICC on 18/06/2008. The invoice for the supply of software was raised on 22/7/2008. On 11/11/2008 an amendment was made to the master contract that UIIC would make the payment directly to the vendor M/s SSPSL UK, for products, services and deliverables provided by them, in dollar terms. Payment of 50% of the licence fee has been made on 27/11/2008 and the balance 50% has not been made till the date of issue of the order in original. The Point of Taxation Rules 2011 came into effect only from 1/3/2011.

5. It has been urged by the appellant that the taxable event is the rendition of service as held by the Apex Court in Association of Leasing and Financial Services Companies Vs. Union of India reported in 2010 (20) STR 417 (SC). They further referred to the clarification of the Government of India vide letter DOF No.334/1/2008–TRU dated 29/02/2008 that "software and upgrade of software are also supplied electronically known as digital delivery. Taxation is to be neutral and should not depend on form of delivery. Such supply of IT software electronically shall be covered within the scope of the proposed service." The Appellant hence submits that the taxable event is rendition of service and which in their case is transmission or supply of software electronically. Since the Service of 'providing the right to use information technology software supplied electronically' was completed in December 2007 itself as it was the date of downloading of the said software, the supply of such service was over before the levy came into force. Therefore, Commissioner's reliance of EULA with SSPSL in the impugned order to fix taxability of IT Service is not tenable. Further fixing the date or point of taxation as the date of raising invoice and payments made is to introduce the Point of Taxation Rules 2011, which came into effect later i.e. only from 01/03/2011. This being so, the completion of providing the service in the manner suggested in the order in original, would not postpone the liability of tax. Further the assessments in the case were provisional at the time

of audit. The Appellant was also eligible to take credit of tax paid under reverse charge. This being so and considering that the matter involved an interpretation of law relating to taxability, extended time for issue of Show Cause Notice could not be evoked nor a penalty imposed.

6. It is the contention of Revenue that mere supply of IT software cannot be said to make the service complete unless other incidental activities are completed. Hence the date of downloading the software is not relevant to determine the taxability of the service. Even though the EULA mentions the effective date of the agreement as 01/01/2008 the said agreement has been entered into only on 27/05/2008, after which date, as per the impugned Order, the delivery, commissioning installation of test hardware, training and installation of software on test hardware and completion of installation to satisfaction of UIIC have taken place. As per para 3 of the EULA dated 27/05/2008 the license to use the SSP software is granted by SSPSL to UIIC in consideration of the due payment of the licence fees by UICC. Subject to the said payment, the agreement grants UIIC a personal, non-exclusive, non-transferable and perpetual license to use the object code version of the SSB software in the territory on the terms stated in the agreement and solely for the business operations of UIIC. Hence the use of the software is granted to UICC only after the payment of licence fee. In these circumstances the claim of the

appellant stating that the service of supply of software is complete immediately after downloading the same into the computer system is not acceptable. The order further states that the execution of the EULA with a prior effective date, immediately after introduction of the levy of service for a software downloaded much earlier, shows that UICC was aware of their liability and did so to avoid tax liability by making an end user license agreement on 27/05/2008 with affective date as 01/01/2008 i.e. six months prior to the date of agreement. They have further suppressed material facts relating to receipt of service from persons outside India by not filing the details of such services received in the ST3 returns. This being so extended time has been rightly invoked and penalty imposed.

7. We have carefully gone through the appeals, the impugned order and all related documents. The main question which arises in this appeal is whether the point of taxation for the right of use of a IT software would be the date on which it is downloaded or after the commissioning of the software. It is not disputed that the software was downloaded in December 2007 while the said service was brought under the tax net only on 16/05/2008. In this context, it would be relevant to reproduce Section 65 (105) (zzzze) of the Finance Act, 1994, below;

> "To any person, by any other person in relation to information technology software for use in the course , or furtherance, of business or commerce, including, -
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> (i) development of information technology software,

(ii) study, analysis, design and programming of information technology software,

(iii) adaptation, upgradation, enhancement, implementation and other similar services related to information technology software,

(iv) providing advice, consultancy and assistance on matters related to information technology software, including conducting feasibility studies on implementation of a system, specifications for a database design, guidance and assistance during the startup phase of a new system, specifications to secure a database, advice on proprietary information technology software,

(v) providing the right to use information technology software for commercial exploitation including right to reproduce, distribute and sell information technology software and right to use software components for the creation of and inclusion in other information technology software products,

(vi) providing the right to use information technology software supplied electronically"

From a reading of the above section, it is clear that the receipt of supply of software, through a download of it by UIIC for their use, from SSPSL would be covered under Section 65(105)(zzzze), if the service is found taxable during the relevant time. Since the Point of Taxation Rules 2011 came into effect only from 1/03/2011, it will not be of help in determining the relevant issue.

8. Any person who purchases goods or services does it with the intention of using it. It is the common parlance understanding that a service can be said to have been delivered when it is done/ completed in a manner that would render its purpose satisfied to the person who sought it. In the context of the Information Technology Software Service, merely downloading the software onto his computer would not be of help to the said person, unless

he can use it. This understanding is also in consonance with the legal provisions. As per the requirements of the relevant provisions of the taxing statute, reproduced above, the taxable event of the service has to be understood, from the point of view of the service being provided to any person by any other person, who is providing the right to use information technology software supplied electronically. That the mode of delivery of service in this case has been done electronically is not disputed. What then needs to be determined, in terms of the above Section, is to ascertain on what date the 'right to use information technology software' took place. It is seen from the time line of events listed above, that apart from the downloading of the software all other major activities which facilitated the actual right to use the software took place only after the Information Technology Software Service was brought under the tax net from 16/05/2008. The contract for the right to use the software, that is End User License Agreement (EULA) was entered into on 27/05/2008, although it was done with an earlier effective date as 01/01/2008. It is only after the signing of the EULA i.e. on 27.8.2005 operationalising it that the right to use the software can be said to have occurred. As per the EULA, the license to use the software in perpetuity was in consideration of the due payment by UIIC of license fee. Subsequently, SSPSL raised an invoice No. 6360 dated 22.7.2008 on UIIC for part payment of software license amounting to USD 1,240,460.50. The license to

use the software was hence only granted after due payment. The 'right to use information technology software supplied electronically' would hence only commence at this point and is the critical event on which the liability to pay tax would get fastened as per the facts and circumstances of this Agreement. This being so the service has been supplied only after Information Technology Software Service was brought under the tax net and is hence subject to the levy. The Appellants reference to the Apex Court decision in Association of Leasing and Financial Services Companies (supra) or the Circular / Letter DOF No. 334/1/2008-TRU dated 29.2.2008 does not come to their help as it does not deal with the determination of the point of taxation and only refers to the taxability of the service per se.

9. It is the Appellants view that the assessments in the case were provisional at the time of audit. The Appellant was also eligible to take credit of tax paid under reverse charge. This being so and considering that the matter involved an interpretation of law relating to taxability, extended time for issue of Show Cause Notice could not be evoked nor a penalty imposed. Just because assessments are provisional would not be an impediment in the finalisation of matters that are not covered by the provisional assessment. Matters that are complete in themselves and are not affected by the terms of the provisional assessment need not be kept pending. The Appellant have drawn our attention to the Judgment of the Hon'ble Madras High Court, in the case of

Commissioner of Central Excise, Chennai – IV Vs. Tenneco RC India Pvt. Ltd. as reported in 2015 (323) ELT 299 (Mad.) to state that when the entire exercise was revenue neutral, the appellant could not have achieved any purpose to evade the duty. Revenue had referred to the judgement of the Apex Court in the case of Dharampal Satyapal Vs. Commissioner of Central Excise, New Delhi 2005-TIOL-75-SC-CX-LB wherein it has been stated that availability of MODVAT cannot be a defence for not paying duty. Revenue neutrality hence is not the only factor while deciding on matters relating to suppression and mis-statement. The adjudicating Authority has to consider the facts and circumstances of each case on merits while deciding the matter. We also find that the Apex Court in its judgment in the case of The Chairman SEBI Vs. Shriram Mutual Funds and Anr. as reported in AIR (2006) SC 2287 has held that, penalty is attracted as soon as the contravention of the statutory obligations as contemplated by the Act and Regulations is established and hence the intention of the parties committing such violations becomes wholly irrelevant. The Adjudicating Authority has in the impugned order given clear reasons as to why the allegations of suppression of facts and intention to evade tax has been arrived by him for invoking the extended time limit. It has been held by Constitutional Courts that appellate bodies cannot be unmindful of the great weight to be attached to the findings of facts of the Original Authority who has first hand knowledge and is in a

position to assess the facts and the credibility of circumstances from his own observation. The exception would be if the order is illogical or suffers from procedural impropriety. Otherwise, even if a superior appellate body feels that another view is possible, it is no ground for substitution of that view in exercise of its appellate power. [B.C. Chaturvedi vs Union of India reported in 1995 (6) SCC 749 and Damoh Panna Sagar, Rural Regional Bank Vs. Munna Lal Jain reported in 2005 (5) SCC 84]. There is also nothing disproportionate or shocking in the penalty imposed to call for modification or interference of the impugned order by this appellate forum.

10. In the light of the discussions above, the points for decision noted at para 3 above have to be answered against the Appellant. The impugned order is upheld and the appeal dismissed.

(Pronounced in court on 22.02.2023)

(**P. DINESHA**)
Member (Judicial)

(**M. AJIT KUMAR**)
Member (Technical)

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