CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 343 of 2011

[Arising out of Order-in-Original No. 82/2010-ST (Commr.) dt. 24/11/2010 passed by Commissioner of Central Excise and Service Tax, Bangalore]

Yokogawa India Limited **……Appellant**
Plot No.96, Electronic City,
Hosur Road,
Bangalore – 560 100

VERSUS

Commissioner of Central Excise & Service Tax, Bangalore **……Respondent**
Bangalore South Commissionerate, C R Buildings,
Queens Road,
Bangalore 560 001

WITH

(i) Service Tax Appeal No. 2559 of 2011 (M/s. Yokogawa India Limited)

(Arising out of Order-in-Original No. 52/2011-ST (Commr.) dt. 30/05/2011 passed by Commissioner of Central Excise and Service Tax, Bangalore)

(ii) Service Tax Appeal No. 2560 of 2011 (M/s. Yokogawa India Limited)

(Arising out of Order-in-Original No. 53/2011-ST (Commr.) dt. 26/05/2011 passed by Commissioner of Central Excise and Service Tax, Bangalore)

(iii) Service Tax Appeal No. 26441 of 2013 (M/s. Yokogawa India Limited)

(Arising out of Order-in-Original No. 38/2013-ST (Commr.) dt. 28/02/2013 passed by Commissioner of Central Excise and Service Tax, Bangalore)

(iv) Service Tax Appeal No. 21868 of 2014 (M/s. Yokogawa India Limited)

(Arising out of Order-in-Original No. 217/2013-ST (Commr.) dt. 05/12/2013 passed by Commissioner of Central Excise and Service Tax, Bangalore)

(v) Service Tax Appeal No. 20119 of 2017 (M/s. Yokogawa India Limited)

(Arising out of Order-in-Original No. BLR-LTUNT-000-COM-20-2016 dt. 28/10/2016 passed by Commissioner of Central Excise and Service Tax, Bangalore)

APPEARANCE:

Mr. K. Parameswaran, Advocate - for the appellant.

Mrs. D.S. Sangeetha, Addl. Commissioner (AR),
Mr. P. Saravana Perumal, Addl. Commissioner (AR),
Mr. K.A. Jathin, Deputy Commissioner (AR) and
Mr. H. Jayathirtha, Supdtt. (AR) – for the respondent

CORAM:

HON'BLE Dr. D. M. MISRA, MEMBER (JUDICIAL)
HON'BLE Mrs. R. BHAGYA DEVI, MEMBER (TECHNICAL)

FINAL ORDER NO. 20949-20954/2023

DATE OF HEARING: 13.04.2023
DATE OF DECISION: 22.09.2023

PER: D. M. MISRA

These six appeals are filed against the respective Orders-in-Original passed by the Commissioner of Central Excise, Bangalore. The details of appeals are tabulated as under:-

Sl. No.	Appeal No.	Impugned order No. Date	Period	Service Tax (Rs.)	Interest	Details of Penalties (Rs.)
1	ST/343/2011	Sl. No. 82/2010-ST (Commr.) dated 24/11/2010	16.05.2008 to 31.08.2009	3,37,53,358/-	Not Quantified	Penalty under 76
2	ST/2559/2011	Sl. No. 52/2011-ST (Commr.) dated 30/05/2011	01.09.2009 to 31.03.2010	56,87,299-	Not Quantified	Penalty u/s 76 & U/s u/s 77 Rs. 5000/- of Finance Act.
3	ST/2560/2011	Sl. No.	01.04.2010	1,67,46,060/-	Not	Penalty u/s

		53/2011-ST (Commr.) dated 26/05/2011	to 30.12.2011		Quantified	76 & U/s77 Rs. 5000/- of Finance Act.
4	ST/26441/2013	Sl. No. 38/2013-ST (Commr.) dated 28/02/2013	01.01.2011 to 30.11.2011	1,29,14,592/-	Not Quantified	Penalty u/s 76 & 77 Rs.10000/- Finance Act
5	ST/21868/2013	Sl. No. 217/2013-ST (Commr.) dated 05/12/2013	01.12.2011 to 30.10.2012	2,56,95,835/-	Not Quantified	Penalty u/s 76 & 77 of Finance Act
6	ST/20119/2017	Order in Original No. BLR-LTUNT-000-Com-20-2016 dated 28/10/2016	01.11.2012 to 30.12.2014	2,68,71,175/-	Not Quantified	Penalty u/s 76 & 77 of Finance Act,1994.

2. Briefly stated facts of the case are that the appellants are engaged in the manufacture of "Distributed Control Systems" (DCS, for short) falling under Chapter sub heading 90328990 of CETA, 1985. It comprises of both hardware and software. The said DCS is required and used for process automation in various industries including in refineries, petrochemicals, cement plants, power plants, fertilizer plant, etc. the main components of the DCS are: (i) hardware comprising of Field Control Stations (FCS) and Operator Stations and (ii) Software comprising of operating software, system software and application software. The customers of the appellant place purchase orders for supply of entire DCS; the software component is supplied for enabling application and processes to be carried out using the customer

specific hardware supplied thereof. The basic software modules are imported in recorded media from their parent company viz. Yokogawa Electric Corporation, Japan and other group companies in Singapore and on which applicable CVD was paid at the time of import as a packaged/canned software. The software modules imported which are specific and unique for each of the hardware is further developed and customized by the appellant depending on the requirement of individual customers. The appellants are also registered for providing various taxable services viz. Maintenance or Repair Services, Management Consultancy Service, Material Handling Service, Online information and database retrieval service, Commercial training and coaching service, Erection, Commissioning and Installation Service, Business Auxiliary Service, Intellectual Property Right Services and Transport of Goods by road service.

3. The appellants have been availing exemption under Notification No. 6/2006-CE dt. 01/03/2006 under the category of Customized Software mentioned at Sl. No. 27 of the said notification by treating the customized software as goods. After introduction of service tax on 'Information Technology Software Services (ITSS, for short) w.e.f. 16/05/2008 and subsequent amendments to the said definition in 2009, it is alleged by the Department that the activities undertaken by them viz. development, adaptation, upgradation, enhancement,

implementation, design and promotion and other similar services relating to ITSS as per the requirement of the customers, they failed to discharge service tax on the customized software for the period from 16/05/2008 to 31/08/2009. Periodical Show-cause notices were issued to the appellant for recovery of the said service tax amount along with interest and penalties thereafter. The said demand Notices were later adjudicated and confirmed with interest and penalties under Section 76 and 77 of the Finance Act, 1994. Aggrieved by the said Orders, the present appeals are filed.

4. At the outset, the learned senior counsel for the appellant submitted that there cannot be any doubt or dispute that the customized software for DCS have been sold by the appellant in a recorded media and under the cover of Central Excise invoices by claiming applicable exemption notification to the said software during the relevant time. It is his contention that when the customized software for DCS cleared by classifying the same under Chapter sub-heading 8523 of CETA, 1985, in a recorded media, then it cannot be considered as rendering taxable services also under the category of ITSS brought into effect from 16/05/2008. It is his contention that the said action of the Department would amount to approbating and reprobating simultaneously and apparently would amount to double taxation, which is not permissible in law.

5. Further emphasizing the procedure followed in supplying the said software, the learned senior counsel has submitted that in the respective purchase orders placed by the customers, it does not provide for undertaking development, modification etc. of any software as wrongly alleged and confirmed in the impugned order; but what has been ordered by the customers is only the developed software package to be sold/ supplied and for which a separate price has been agreed upon and thus, prima facie, even if any such process of development, modifications etc. is undertaken by the appellant on the software imported, it would at best be in the nature of only self-service thereof. It is his contention that the activities such as development, modifications etc. of software, the same cannot be construed as rendered to any other person/client, hence not a taxable service. In support, he has referred to the judgment of this Tribunal in the case of *CMS (I) Operations & Maintenance Co. P. Ltd. Vs. CCE* [2007(7) STR 369] which has been later upheld by the Hon'ble Supreme Court reported in 2017(4) GSTL J75.

6. Further, he has submitted that in the appellant's own case reported in 2005(187) ELT 50, it has been held by the Tribunal that software is a distinct commercial commodity and since the said order of the Tribunal was not challenged, it attained finality. In support, he has also referred to the decision of Tribunal in the case of *CCE Vs. ABB Ltd*. [2005(190) ELT 455].

He has further vehemently argued that when software is sold/cleared only in a recorded media like CDs, it would become goods and cannot be subjected to levy of service tax simultaneously along with excise duty charged on the same. This principle has been affirmed in several decisions rendered by various courts.

(i) *Tata Consultancy Services Vs. State of Andhra Pradesh* [2004(178) ELT 22 (SC)]

(ii) *Bharat Sanchar Nigam Ltd. Vs. UOI* [2006(2) STR 161 (SC)]

(iii) *Antrix Corporation Ltd. Vs. Asst. Commissioner of Commercial Tax and others* [2010-TIOL-515-HC-KAR-CT]

(iv) *Infotech Software Dealers Association Vs. UOI and others* [2010-TIOL-620-HC-MAD-IT]

(v) *Intellicon Pvt. Ltd. Vs. CCE* [2014(35) STR 966]

(vi) *Sri Rama Vilas Service Ltd. Vs. CCE* [2019(25) GSTL 117]

7. Further referring to the judgment of the Hon'ble Supreme court in the case of *Imagic Creative Pvt. Ltd. Vs. CCT* [2008(9) STR 337 (SC)], he has submitted that payment of service tax as also VAT are mutually exclusive and hence become applicable only within the respective parameters/enactments thereof. Same principle has also been laid down in the case of *Sobha Developers Ltd. Vs. CCE* [2010(19) STR 75], which has been upheld by the Supreme Court as reported at 2017(49) STR J26 (SC)]. Further, he has argued that since the said software in recorded media has been cleared on payment of applicable rate of excise duty ('nil' rate of duty being exempted) as well as Sales Tax/VAT, no service

tax could be demanded unless it is established that there has been any rendition of service separately, other than supply of developed/manufactured/customized software in recorded media to the clients. It is his contention that no such evidence has been brought on record by the Department nor discussed in the impugned orders passed by the Commissioner. Instead, entire sales value of the software has been considered as value of the taxable service provided, in computing the service tax demand under the category of ITSS, when the said software cleared in a recorded media like CDs and held to be excisable goods.

8. Referring to the service tax entry viz. Business Auxiliary Service (BAS) for the period up to 30/06/2012, the learned senior advocate submitted that it is laid down that activity of 'manufacture' of goods under Central Excise Act,194 cannot be subjected to service tax levy being specifically excluded from the scope of the definition of BAS under the Finance Act, 1994. The same position continued to be covered under the scope of negative list specified in Section 66D(f) of the Finance Act, 1994 w.e.f. 01/07/2012. Thus, any activity that amounts to manufacture or production of goods, which automatically get excluded from the scope of levy of service tax, since even as per Section 66B, w.e.f. 01/07/2012, service tax can be levied only on such services other than those specified in the negative list.

9. Further, the ld. Senior counsel has submitted that for the period up to 30.6.2012 what is excluded specifically under one category of service namely, Business Auxiliary Service cannot be subjected to service tax under any other category of service, including under the Information Technology Software Services. In support they placed reliance in the case of *Dr. Lal Path Lab Vs. CCE* - 2006 (4) STR 527 followed in the case of *Federal Bank Ltd. Vs. CCE* - 2008 (10) STR 320 and upheld by Kerla High Court. He has further submitted that the Department cannot approbate and reprobate simultaneously on the same issue and cannot also demand duty/tax indirectly when the same cannot be demanded directly. In support he referred to the judgement of Hon'ble Supreme Court in the case of *CCE Vs. Acer India* - 2004 (172)ELT 289(SC) and Larger bench in the case of *Lancho Infratech Ltd Vs. CCE & ST, Hyderabad* - 2015 (38) STR 709 (Tri-LB).

10. Further, it is submitted that the observation in paragraph 14.1.3 of the impugned order is self-contradictory. The logic and reasoning adopted opposed to the very definition of goods, which includes both tangible and intangible property as held by the Hon'ble Supreme Court in various cases.

11. Distinguishing the judgement of Hon'ble Supreme Court in *Suzlon energy Ltd*'s case referred by the Revenue, the Ld. Senior counsel submitted that the facts and circumstances of the said case are different and is not applicable to the present case. It

is his contention that the observation of the Supreme Court contained in paragraphs 7,8,9 and10 of the said judgement has been rendered in the peculiar facts of the said case and on the ground that Service Tax was payable on reverse charge basis on the engineering, design and drawing services received from associated enterprises abroad; also in the invoice raised for import, it was considered as "paper", accordingly customs duty payable was declared to be "nil". Further, it is observed that since the Customs Authority considered the same as 'goods' therefore the view taken by the Tribunal that the same cannot be taxed as goods and services is erroneous, since the same activity can be taxed as both goods and services, provided the contract is indivisible; it is held that on the aspect of service, there may be levy of service tax and that the said aspect has not been considered by the Tribunal, not withstanding the findings recorded by the Commissioner in the order. It has been held that there is a distinction between sale of goods and contract of service, what is relevant is the intention of contracting parties. Thus, by applying the aspect theory it has been held that design services could be subject to service tax and remanded the matter to the Tribunal as the grounds raised by the respondent not considered. It is his contention that on the other hand the principle laid down in the case of *Imagic Creative Pvt. Ltd*'s case would be applicable to the facts of the present case. Further he is submitted that looking from any angle decision of the Hon'ble Supreme Court in Suzlon's

case would not be applicable to the facts of the present case, particularly since the decision in the case of BSNL 's case rendered by a Bench comprising of three judges of the Hon'ble Supreme Court.

12. It is submitted that the decision of the Hon'ble Madras High Court in Infotech Software Dealers Association relied upon by the Department also not applicable to the facts of the present case as in paragraph 22 of the said judgement it is held that if customised software sold through a medium of Internet, the same could not fit into ambit of IT software of any media and thus does not satisfy the requirements of being goods. It is further submitted that the said judgement upholds the levy of service tax, but does not lay down any proposition to the effect that the customised software will have to treated as only service for the purpose of levy of service tax, particularly after introduction of the said ITSS thereof.

13. Further it is submitted that the judgement of Infosys Ltd cited by the revenue is clearly distinguishable, since the assessee in the said case considered Finnacle Software w.e.f 16.5.2008 as a service and the contention was that the said software cannot be charged to Excise duty as packaged or canned software. However, the said arguments have been rejected, since the amount recovered as license fees would be subject to Service Tax, but the same would be subject to Excise duty if sold in the form of CDs as

a manufactured product and that only the additional amount recovered towards various services would be liable to Service Tax under the heading Information Technology Software Services thereof.

14.1 Learned AR for the Revenue reiterating the findings of the learned Commissioner submitted that the activities carried out by the appellant viz. development, adaptation, upgradation, enhancement, implementation, design & programming and other similar services related to information technology services as per requirement of the customers attract service tax under the category of ITSS provided to their clients as per Section 65(105)(zzzze) of the Finance Act, 1994. He has submitted that in view of the amendments in 'Management, Maintenance or Repair Services' w.e.f. 16/05/2008, the Information Technology Software Service is to be considered as "properties". The activity of designing, developing or any other service primarily in relation to operation of computer system, i.e. information technology software only, when transferred to a media would fall within the meaning of manufacture under Section 2(f) of the Central Excise Act, 1944 and classifiable as excisable goods under Chapter 8523 of CETA, 1985 depending on the nature of the media such as discs, tapes, solid state non-volatile storage devices etc. He has submitted that in the present case, the activity of developing, adaptation, upgradation, enhancement, implementation, design

& programming etc. of the customized software undertaken by the appellants fall within the meaning of the Information Technology Services as defined in Explanation (b) of the definition of BAS which is distinct from the activity that amount to manufacture under Section 2(f) of Central Excise Act. He has submitted that an activity amounting to manufacture of excisable goods would also to be liable to service tax when the same gets classified within any of the taxable services less than BAS unless and otherwise specifically excluded from the scope of levy of service tax under that particular category of service.

14.2 The service tax has been demanded in the present case under the taxable category of "ITSS". The activity of generating of application software by taking into account various engineering inputs provided by customers and process consultants, based on the imported DCS software modules, which are specific to each other and sub-modules of which are configured on job work basis to meet each of the customer's requirements would amount to customization of software. He has contended that certain standard software packages are brought, modified or upgraded to suit the requirement of the customers. The modification may be to adapt to the need of the customers or upgradation or enhancement or implementation of the software. Packaged or canned software intended for multiple uses, though considered as excisable goods, the sale/supply of

which will also be considered as service being rendered and the consideration paid or payable for transfer of the right to use such packaged or canned software is subjected to service tax. In support, the Ld. AR has referred to the judgment of the Hon'ble Supreme Court in the case of CC,CE&ST Vs. Suzlon Energy Limited (Judgement dt. 10/04/2023), Yokogawa India Ltd. Vs. CC, Bangalore [2008(226) ELT 474 (Tri. Bang.)], Infotech Software Dealers Association Vs. UOI & Others [2010(8) TMI 13 (HC of Madras)] and Infosys Limited Vs. CCE &ST [2018(4) TMI 150 (CESTAT, Bangalore)].

15. Heard both sides and perused records.

16. The core issue involved in the present Appeals for determination is: whether the imported software, customized and sold/cleared by the Appellant along with DCS, classifying the same under Chapter sub-heading 85238090 of CETA, 1985 (by availing exemption under Notification No.6/2006CE dt.01.3.2006 and No.12/2012-CE dt. 17/03/2012 as amended, as the case may be) continue to be an 'Excisable goods' or the said software sold/supplied on the CD is a 'service' and leviable to service tax w.e.f. 16/05/2008 under the taxable category of 'Information Technology Software Services' (ITSS) as held in the impugned Order.

17. Before analysing the contentions raised by both sides, it is essential to read the relevant entries under the Central Excise Tariff Act, 1985, relevant Notifications and Finance Act, 1994 which are reproduced as below:-

Note 10 of CH 85

"10. For the purposes of heading 8523 "recording" of sound or other phenomena shall amount to manufacture."

Supplementary Note

"For the purposes of heading 8523, "Information Technology Software" means any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine."

Tariff item	Description of goods	Unit	Rate of duty
8523	- DISCS, TAPES, SOLID-STATE NON-VOLATILE STORAGE DEVICES, "SMART CARDS" AND OTHER MEDIA FOR THE RECORDING OF SOUND OR OF OTHER PHENOMENA, WHETHER OR NOT RECORDED, INCLUDING MATRICES AND MASTERS FOR THE PRODUCTION OF DISCS, BUT EXCLUDING PRODUCTS OF CHAPTER 37 - Magnetic media	Kg.	16%
…. …. ….	…. …. ….		
8523 40 90	Other	u	16%
	- Semi-conductor media:		
8523 51 00	Solid-state non-volatile	u	16%

	storage devices		
8523 52	Smart cards;		
8523 52 20	Memory cards	u	12%
8523 52 90	Other	u	12%
8523 59	Other;		
8523 59 10	Proximity cards and tags	u	12%
8523 59 90	Other	u	12%
8523 80	Other:		
8523 80 10	Gramophone records	u	16%
8523 80 20	Information technology software	u	8%
8523 80 30	Audio-visual news or audio visual views	u	16%
8523 80 40	Children's video films	u	16%
8523 80 50	Video tapes of educational nature	u	16%
8523 80 60	2-D /3D computer graphics	u	16%
8523 80 90	Other	u	16%

The relevant entry under Notification viz. No.6/2006-CE dt. 01/03/2006 as amended and No.12/2012-CE dt. 17/03/2012 under which the appellant cleared the goods at NIL rate of reads as follows:-

Sl. No.	Chapter or heading or sub-heading or tariff item of the First Schedule	Description of excisable goods	Rate	Condition No.
27.	8524	Any customized software (that is to say, any custom designed software, developed for a specific user or client), other than packaged software or canned software	NIL	---
		Explanation.- For		

		the purposes of this entry, "packaged software or canned software" means a software developed to meet the needs of variety of users, and which is intended for sale or capable of being sold, off the shelf		

Sl. No.	Chapter or heading or sub-heading or tariff item of the First Schedule	Description of excisable goods	Rate	Condition No.
27.	8523	(a) Any customized software (that is to say, any custom designed software, developed for a specific user or client), other than packaged software or canned software.	NIL	---
		(b) Packaged Software	12%	
		Explanation.- The expression "packaged software or canned software" means a software developed to meet the needs of variety of users, and which is intended for sale or capable of being sold, off the shelf		

Definition of Information Technology Software under the Finance Act, 1994.

> ***Section 65(53a):***
> ***"Information Technology Software"*** *means any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of a computer or an automatic data processing machine or any other device or equipment.*
>
> ***Section 65(105)(zzzze)****: Taxable service means any service provided or to be provided, to any person, by any other person in relation to information technology software including*
> *(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.*

18. Now, in the light of above provisions, let us examine the activities carried out by the Appellant to ascertain whether the same fall under the scope of Excisable goods or a service.

One of the Purchase Orders issued by M/s Kerala Minerals And Metals Ltd. Appended the Appeal is reproduced below:

JOb MML

KMML
Spreading Splendour

KERALA MINERALS AND METALS LIMITED
SANKARAMANGALAM,CHAVARA
KOLLAM, KERALA

SYNTHETIC RUTILE EXPANSION PROJECT

S0101595

TP-IR-SR-PROJ-01
Date: 30-07-2009

Purchase order No: KMML/CRP/SR/DCS/06/PO/S/09

To M/s Yokogowa India Limited
India Garade Building, 3rd Floor
184, Mount Road
Chennai -600006

Attention – Mr. S. Chockalingam
Executive Manager
Systems Sales, YIL

Dear sirs,

Sub: Purchase order for design, Engineering, Manufacturing, Procurement, Supply, Testing at works, Inspection, Transportation and delivery at site of the entire DCS for the Ilmenite Beneficiation Plant (IBP) of KMML, CHAVARA, KOLLAM, KERALA

Ref:

1. *Tender No KMML/CRP/SR/DCS/06 Dtd 24.12.2008*
2. *MOM of Pre Bid TP/IR/SR PROJ/01 Dtd 21.01.2009*
3. *Offer from Yokogawa YIL/CS3/FS0902120/ME/SC/R0 Dtd 11.02.09*
4. *Minutes of meeting between KMML and YOKOGOWA held on 02.04.09*
5. *Revised Price bid of M/s Yokogawa YIL/CS3/FS0902120/ME/SC/R1 Dtd 13/04/2009*
6. Commercial negotiation report of *M/s Yokogawa* for SR project DCS *YIL/CS3/FS0902120/ME/SC/R1 Dtd 03/06/2009*
7. *Our LOI TP-IR-SR-PROJ-01 date: 29.06.2009*

Vide reference to the above and in continuation of our LOI date: 29.06.2009, we are pleased to place the purchase order on you for the subject work in Ilmenite Beneficiation Plant of KMML as per following terms and conditions

Purchase order for DCS (IBP) *Page 1 of 4*

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KMML Spreading Splendour

KERALA MINERALS AND METALS LIMITED
SANKARAMANGALAM,CHAVARA
KOLLAM, KERALA

SYNTHETIC RUTILE EXPANSION PROJECT

Scope of Work

Scope of supply shall include design, Engineering, manufacture, Procurement, Painting, supply, testing at work, Inspection, transportation and delivery at site of the entire DCS including cables of erection hard wares, one way plant communication,Training,Insurance, commissioning spares, two years operation & maintenance spares and consumables for one year as per the technical specification

Contract price

The total contract price for the entire scope of supply as outlined in the technical specification shall be Rs.13699204/- (One crore Thirty six Lakhs Ninety nine Thousand two hundred and four rupees only) including taxes and duties, The summary of the price schedule is given below.

Supply of DCS and accessories as per Appendix-A	Rs 8805000
Supply of cables of erection materials	Rs 3775000
Excise duty	Rs. 850592
Sales tax	Rs. 268612
Total	Rs13699204

The contract price is inclusive of packing and forwarding charges, freight insurance and all applicable taxes and duties. Detailed price split up is attached in Appendix-B

The contract price or rates shall remain firm and binding during the tenure of the contract and shall not be subject to any escalation whatsoever.

Time schedule

The entire DCS with accessories, cables and erection materials as per the scope of work shall be supplied with in 6 months from the date of release of 10% advance against bank guarantee for an equal amount

Adv. Recd on 1/9/09.

Term of payment

1. 10% advance of supply values against bank guarantee of an equal amount.
2. 75% of the supply value including 100% duties and taxes if any shall be paid on receipt and acceptance of material with in 15 days of submission of relevant certificates for CENVAT
3. Balance 15% of the supply value shall be released with in 90 days on satisfactory completion of erection & commissioning and performance guarantee runs of DCS and on submission of performance bank guarantee for an equivalent amount in the prescribed format towards warranty

KERALA MINERALS AND METALS LIMITED
SANKARAMANGALAM,CHAVARA
KOLLAM, KERALA

SYNTHETIC RUTILE EXPANSION PROJECT

period . If the commissioning is delayed due to KMML more than for 90 days, balance 15% of the supply payment will be released against PBG

Liquidated damages for delay

The time and date stipulated in the contract for completion of the contract work shall be deemed to be the essence of the contract. In case of the contractor fails in the due performance of his contract to deliver any part of the equipment with in the agreed time schedule, and if the commissioning is delayed due to this, he shall be liable to pay liquidated damages at the rate of 1% of the contract values per month of delay or part thereof subject to maximum of 5% of the purchase order.

Security Deposit

Security deposit, in the form of bank guarantee for Rs 684960 /-(Six Lakhs Eighty Four Thousand Nine Hundred And Sixty Rupees Only), being 5% of the contract value (supply, erection and commissioning), valid till the completion of the scope of work shall be submitted in the prescribed format (enclosed here with) with in 10days of the receipt of this purchase order. The security deposit furnished by the contractor shall be for the due performance of his obligations under this purchase order.

Performance Guarantee

The performance guarantee period shall be 12 month from the date of commissioning or 18 month from the date of dispatche which ever in earlier. During the guarantee period the contractor shall be liable to rectify /replace any item/parts that may fail or show sign of defects.

Effective date

The effective date of contract shall be from the date of release of 10% advance against bank guarantee for an equal amount

General

All other terms and conditions shall be as per our tender document, GCC (Clauses relevant to erection shall not be applicable), technical specification and subsequent discussion and mutual agreement as recorded in MOM and correspondences indicate above. The certificate for successful commissioning and final acceptance shall be issued by KMML.

Jurisdiction

All disputes, difference arising under out of or in connection with the purchase order shall be subject to the exclusive jurisdiction of complete court at Kollam, Kerala state

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KMML Spreading Splendour

KERALA MINERALS AND METALS LIMITED
SANKARAMANGALAM,CHAVARA
KOLLAM, KERALA

SYNTHETIC RUTILE EXPANSION PROJECT

Future correspondence

All correspondence in connection with the purchase order: KMML/CRP/SR/DCS/06/PO/S/09 shall be addressed to

General Manager (TP),
The Kerala Minerals and Metals Ltd
Sankaramangalam, Chavara
Kollam-691583
Kerala, India.
Phone- 0476-2686722 to 2686733.
Fax : (91)476-2686720,2680101.
E-mail: kmml@md3.vsnl.net.in,
URL: www.kmml.com .

Acceptance of the purchase order

Please acknowledge receipt and return one copy of this purchase order duly signed and stamped on each page by you as token of its acceptance

Thanking you

Yours faithfully
FOR THE KERALA MINERALS AND METAL LTD

GENERAL MANAGER (TP)

For MANAGING DIRECTOR

Enc:

1. Annexure –I : Proforma Ethics Pact
2. Annexure –II : GCC
3. Annexure –III : Safety Regulations
4. Annexure –IV : Technical specification for DCS and instrumentation
5. Annexure –V : Advance ,SDBG and PBG formats

19. A plain reading of the 'scope of work' under the above purchase order reveals that the appellants are required to deliver at the site of the customer, the entire DCS system which includes both hardware and software and consumables.

20. The Senior Counsel appearing for the appellant has vehemently argued that as part of the DCS system, the appellant imported the software from their overseas group companies in Singapore and discharged applicable CVD on the said packaged / canned software declaring the same under CTH 85238020 of Customs Tariff Act, 1975. No cenvat credit has been availed on the CVD paid on such canned software. The said software later customized by the appellant after taking inputs from the clients about their requirements and later sold on a media i.e. CD to the customers along with DCS. It is his argument that the said customized software finds a place in the excise tariff and sold/cleared on a media raising Central Excise invoices being excisable goods, as per the agreed terms and conditions of the Purchase Order of the respective customers, hence, the same Customize software cannot be subjected again to service tax under Information Technology Software Service inserted w.e.f. 16/05/2008, as the same is not sold/supplied as 'service'.

21. There is no dispute on the clearance/sale of customized software under separate excise invoices along with DCS classifying the same under Chapter sub-heading 85238090 of

CETA,1985 and availing benefit of exemption Notification No.6/2006-CE dt. 01/03/2006 prior to 16/05/2008. It is also not is dispute that Canned software/Customized software as "goods" being held in a series judgments accepted by both sides. But, the dispute arose only after introduction of the service tax on 'Information Technology Software Service' w.e.f. 16/05/2008.

22. The claim of the Revenue is that after introduction of the levy of service tax on 'Information Technology Software service' w.e.f 16.5.2008, the imported software, customized and supplied with DCS by the appellant is a 'service' as defined under Section65(53a) read with taxable category of Section 65(105)(zzzze) of the Finance Act,1994, and accordingly leviable to service tax.

23. It is to be noted that even after introduction of the service tax on the 'Information Technology software Service' more or less on similar line of definition of 'Information Technology software' already present under supplementary note of Chapter 85 of CETA, 1985 and the classification of the said software under Chapter Heading 8523 of CETA, 1985 continued in the Central Excise Tariff Act without any amendment or alteration to the same. In other words, the intention of the Legislature was continuation of levy of excise duty on the activity of manufacture and sale of Information Technology software and also levy service tax for providing Information Technology Software

service. Thus, the precise question is, whether the same activity of supply/sale of customized software by the Appellant could be chargeable to Excise duty and/or also service tax post 16.5.2008 as admittedly there is no change in the facts and circumstances of the case.

24. We find a more or less similar question has come up before the Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd.'s case(supra). The question raised was whether supply of sim cards in rendition of telephone service by Telegraph authority to a subscriber resulted in sale and leviable to State VAT/Sales tax or a pure service chargeable to service tax under the relevant entry of Finance Act,1994. Their Lordships analysing the Constitutional provisions of levy of service tax and the scope of 'deemed sale', observed at para 48 as follows:-

> ***"48.*** *What are the "goods" in a sales transaction, therefore, remains primarily a matter of contract and intention. The seller and such purchaser would have to be ad idem as to the subject matter of sale or purchase. The Court would have to arrive at the conclusion as to what the parties had intended when they entered into a particular transaction of sale, as being the subject matter of sale or purchase. In arriving at a conclusion the Court would have to approach the matter from the point of view of a reasonable person of average intelligence."*

Recording conclusion, their Lordships at para 80 had observed as follows:-

> ***80.*** *It is not possible for this Court to opine finally on the issue. What a SIM card represents is ultimately a question of fact as has been correctly submitted by*

> *the States. In determining the issue, however the Assessing Authorities will have to keep in mind the following principles: If the SIM Card is not sold by the assessee to the subscribers but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sales tax. It would depend ultimately upon the intention of the parties. If the parties intended that the SIM card would be a separate object of sale, it would be open to the Sales Tax Authorities to levy sales tax thereon. There is insufficient material on the basis of which we can reach a decision. However we emphasise that if the sale of a SIM card is merely incidental to the service being provided and only facilitates the identification of the subscribers, their credit and other details, it would not be assessable to sales tax. In our opinion the High Court ought not to have finally determined the issue. In any event, the High Court erred in including the cost of the service in the value of the SIM card by relying on the aspects doctrine. That doctrine merely deals with legislative competence. As has been succinctly stated in Federation of Hotel & Restaurant Association of India v. Union of India (1989) 3 SCC 634 - "subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power. They might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is overlapping does not detract from the distinctiveness of the aspects". No one denies the legislative competence of States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction."*

Thus, their Lordships after laying down the guiding principle in deciding the transaction whether results into sale of sim cards or rendition of taxable service, left the question open in the said case, to ascertain the same from the terms of the contract and intention of the parties to the transaction.

25. The Hon'ble Madras High Court in the case of Infotech Software Dealers Association Vs. UOI and others (supra) addressed the issue of constitutional validity of imposition of service tax on 'Information Technology Software Service'. While upholding the levy as constitutionally valid, their Lordships observed at para 32 & 33 as follows:-

> *"**32**. The above discussion as to the canned/packaged software or customised software is in respect of the transactions that are prevalent among the software re-sellers and their customers and the discussion is not with reference to any specific transaction. The challenge to the amended provision is only on the ground that the software is goods and all transaction would amount to sales. The said challenge is opposed on the ground that though the software is goods, the transaction may not amount to a sale in all cases and it may vary depending upon the End User Licence Agreement. As already pointed out, the Parliament has the legislative competency to bring in enactments to include certain services provided or to be provided in terms of information technology software for use in the course or furtherance of business or commerce to mean a taxable service, in terms of the residuary Entry 97 of List I of Schedule VII, the challenge to the amended provision cannot be accepted so long as the residuary power is available.* ***However, the question as to whether a transaction would amount to sale or service depends upon the individual transaction and on that ground, the vires of a provision cannot be questioned****.(emphasis supplied)*
>
> ***33.*** *It is the specific case of the respondents that pursuant to the amended provision, so far no demand has been raised against any of the members of the petitioner-Association and in the event such demands are made, the members of the petitioner-Association can challenge such demands depending upon the nature of transaction and may consequently resist the imposition of tax by showing that the transaction is only a sale and not a service. Therefore, we are of the considered view that the amended provision cannot be held to be unconstitutional on the ground that the Parliament lacks the legislative competency and the*

applicability of that provision would depend upon the individual transactions which could be established before the authorities as and when the demand is made."

26. Therefore, in view of above laid down principles, what is necessary in a given case is to examine the true nature of transaction between the parties to the contract to ascertain whether the transaction is a sale or service. The learned senior counsel for the appellant argued by referring to various Purchase Orders enclosed with the appeal paper book that the intention of the parties to the transaction is that of a 'sale' of the software as 'goods' before and after 16.5.2008. The appellant has not retained any title to the software after it is customized and sold by putting the same in the form of CD along with DCS.

27. The Purchase Order placed on the Appellant referred above is for design, engineering, manufacture, procurement, painting, supply, testing at work, inspection, transportation and delivery at site of the entire DCS for the Illmenite Beneficiation Plant. The scope of work also mentions the supply which includes design, engineering, manufacture, procurement, painting, supply, testing at work, inspection, transportation and delivery at site, the entire DCS including cables of erection hardware, one way plant communication, training, insurance, commissioning spares, two years operation & maintenance spares and consumables for one year as per the technical specification. The contract price was

for Rs.1,36,99,204/- and the detailed price split up has been narrated in Appendix B to the said contract. In Appendix B at Sl.No.9, software development and documentation were shown as Rs.15,04,500/-. So, the contract is for sale/supply of hardware and software and installation of the said DCS in the premises of the customer viz. The Kerala Minerals and Metals Limited. The price of the hardware and the that of software sold on CD is identifiable and shown separately. The software has been supplied/sold by raising invoices separately mentioning therein the value of the software and also its classification under CSH 8523 of CETA, 1985 including applicable exemption notification under the relevant notifications. There is no dispute on the valuation of software.

28. The learned Commissioner in the impugned order, confirming the demand adopted a different approach. He has accepted the proposition of law that 'information technology software' sold/supplied in a recorded media is excisable goods. However, referring to the definition of BAS prior to and after 16.5.2008, and scope of clause (b) to the inserted Explanation to definition of 'Management, Maintenance or Repair Service', held that 'Information Technology Software Service' is to be considered as 'properties'. It is his reasoning that if 'Information Technology Software' was to be considered as 'goods' only post 16.5.2008, there was no need to specifically provide in the said

Explanation that "properties" include information technology software; thereby rejected the contention of the appellant that when a particular item considered as sale/supply of goods, it could not be amenable to service tax having been rendered in relation to the said sale/supply of goods. Further, referring to the definition of Information Technology Software service, the learned Commissioner came to the conclusion that the activities undertaken by the appellant viz. generating application software by taking into account the various engineering inputs provided by the customers and process consultants based on the imported DCS software modules which are specific to each other and the subject modules of which are configured on job work basis to meet each of the customers' requirements, would amount to customization of software. The modifications may be adopted to the need of the customer or upgradation or enhancement or implementation of the software. Thus, the activity of customizing the software would fall within the meaning of Information Technology Software Service and gets classified under taxable category of Information Technology Software Service.

29. We are of the view that the learned Commissioner has misdirected himself in understanding the scope of the applicability of excise duty on manufacture of 'Information Technology Software' and levy of service tax on 'Information

Technology software service' introduced w.e.f 16.5.2008 and applying the same to the facts of the present case. No doubt excise duty or service tax is leviable on the Information Technology software if sold/supplied after 16.5.2008 as an excisable goods or as a service, as the case may be, but the said levies cannot be imposed simultaneously on the same activity/transaction. In a given case it needs to be examined whether excise duty is attracted or the activity is a pure service. It is also true that merely because either duty or tax discharged in a given case, the other levy is not automatically excluded. On the contrary, the true nature of the transaction is the determinant for levy of excise duty or service tax. In *BSNL*'s case the Hon'ble Supreme Court has held that VAT or Service Tax could levied on the sale/supply of SIM card, but to ascertain which tax is levied in a particular case, it is relevant to find out the intention of the parties to the contract, which is the determining factor, in deciding whether the activities in question is a transaction of sale or a pure service. Looking from the said angle and considering the Purchase Order, we are of the opinion that the software imported by the appellant was customized according to the need of the individual DCS, supplied the same along with hardware being a condition of the of sale of said DCS. The said software cannot be used by anybody else other than the customer to whom the same are supplied along with the hardware. This clearly indicate that the intention of the appellant

in supplying the software to their customers, is for its use along with the hardware; it does not indicate that the ownership of the software is retained by the Appellant. On the contrary, it is transferred to the customers in a media i.e. CD and the price of the said software separately indicated in the Appendix B to the purchase Order. Hence, the presence of an element of pure service as alleged by the Revenue and confirmed by the Commissioner is not the intention of the parties to the transaction. Thus, the sale of customized software by the Appellant is 'excisable goods' and classifiable under Chapter sub-heading 85238090; hence leviable to excise duty, and subject to the exemption notification No. 6/2006-CE dt.1.3.2006 and 12/2012-CE dt. 17.03.2012, as the case may be, on fulfilment of laid down conditions as claimed by the appellant.

30. We agree with the contention of the Ld. Senior Counsel for the Appellant that the judgment of Hon'ble Supreme Court cited by the learned AR for the Revenue viz. Suzlon Energy Ltd. (supra), is not applicable to the facts of the present case. In the said case, the design and drawings for the purpose of manufacture of Wind Turbine Generator was imported declaring the same as paper under Chapter sub-heading 4911 99 20 of the CTA,1975 and claimed 'NIL' rate of customs duty under Notification No.21/2002 for BCD and Notification No.20/2006 for CVD. During the course of audit, it was objected that the drawing and designs are chargeable to service tax under the

category of Design Services for the period June 2007 to September 2010. It is argued before the Supreme Court that once the Drawing and Designs are considered as goods by Customs authorities, it cannot be considered for levy of service tax. The Hon'ble Supreme Court has rejected the argument. Their Lordships observed that merely because the Customs Notification considered the same as 'goods', hence, the said activity cannot be considered for tax as service is not the correct proposition as the levy is on different aspects. Reversing the judgment of the Tribunal which held on the said premise that the design and drawings are goods but not service, their Lordships remanded the matter to the CESTAT to examine the issue. In delivering the said judgment, their Lordships referred to its earlier judgment in BSNL's case. In other words, without scrutiny of the intention of parties, merely because the relevant customs Notification refers to drawing and designs as 'goods' and assessed so by the Customs Authorities, the levy of service tax on the same cannot outrightly be discarded. The intention of the parties to the transaction needs to be ascertained. In the present case, the Purchase Orders placed by the customers on the appellant reveal that the transaction between the appellant and their customers are not for supply of software as that of a 'service', but it is sale of the customized software on a CD as part of the DCS; accordingly, the same should be considered as 'excisable goods' and not as 'service', precisely, ITSS.

31. In view of the above findings, the impugned orders are set aside and appeals are allowed with consequential relief, if any, as per law.

(Pronounced in the court on 22.09.2023)

(D. M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

Raja+ saifi