CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70222 of 2020

(Arising out of Order-in-Appeal No.NOI-EXCUS-001-APP-1486-19-20 dated 26/02/2020 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida)

Commissioner of Central Excise &
Service Tax, Noida .....**Appellant**
(C-56/42, Sector-62, Noida)

VERSUS

M/s Acidaes Solutions Pvt. Ltd., ...**Respondent**

(Unitech infospace Tower-1,
Ground floor, Plot No.2, Sector-62, Noida)

WITH

Service Tax Appeal No.70223 of 2020

(Arising out of Order-in-Appeal No.NOI-EXCUS-001-APP-1396-19-20 dated 11/02/2020 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida)

Commissioner of Central Excise &
Service Tax, Noida .....**Appellant**
(C-56/42, Sector-62, Noida)

VERSUS

M/s Acidaes Solutions Pvt. Ltd., ...**Respondent**

(Unitech infospace Tower-1,
Ground floor, Plot No.2, Sector-62, Noida)

APPEARANCE:

Shri Manish Raj, Authorised Representative for the Appellant
Shri Sanjay Kumar, Advocate for the Respondents

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NOs.70958-70959/2024

DATE OF HEARING : 08 November, 2024
DATE OF DECISION : 08 November, 2024

SANJIV SRIVASTAVA:

These two appeals are directed against Order-in-Appeal No.NOI-EXCUS-001-APP-1486-19-20 dated 26/02/2020 &

No.NOI-EXCUS-001-APP-1396-19-20 dated 11/02/2020 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida. By the impugned order Commissioner (Appeals) has dropped the demand against the respondents vide Order-in-Original as detailed in table bellow:-

Sl. No.	**Appeal No.**	**O-I-O**	**O-I-A**
1	ST/70222/2020	01/Addl.Commr./ST/Noida/2019-20 dated 30-04-2019	NOI-EXCUS-001-APP-1486-19-20 dated 26/02/2020
2	ST/70223/2020	08/Joint.Commr./ST/Noida/2018-19 dated 11-10-2018	NOI-EXCUS-001-APP-1396-19-20 dated 11/02/2020

2.1 Respondents are providing taxable services Management or Business Consultant Service, Online Information and Database Access and/or Retrieval Services (OIDAR), Maintenance and Repair Services etc.

2.3 Respondents has declared the taxable value provided in ST-3 and claimed deduction and not paid service tax on the value of taxable service to the amount charged against export of service. Export of service provided or to be provided under the category of OIDAR.

2.4 During the period from:

- October, 2014 to March, 2015 the value of said services provided by him was amounting to Rs.5,65,45,489/- on which service tax due was Rs. 69,89,023/-; and
- April, 2016 to November, 2016 the amount of value of taxable service was Rs.7,11,92,521/- on which service tax payable was Rs.1,06,78,878/-.

2.5 Show cause notice dated 07.11.2017 was issued to the respondent asking them to show cause as to why-

(a) The service tax amounting to Rs.69,89,023/- (Rs.67,85,459/-S.Tax)+Rs 1,35,709/- (Ed Cess)+ Rs. 67,855/-(SH.Ed Cess)/-) (Rs. In words- Sixty Nine Lakh Eighty Nine Thousand Twenty Three Only) not paid/short paid during the period of Oct'2014 to March'15 should not be recovered from them under

Section 73(1) of the Finance Act'1994 alongwith interest under Section 75 of the Finance Act'1994

(b) *Penalty should not be imposed upon them under Section 78 of the Finance Act`1994.*

2.6 Subsequently, a statement of demand dated 09.10.2018 was issued to the respondent, asking them to show cause as to why-

"(i) Service Tax amounting to Rs. Rs. 1,06,78,878/- (Rs. One Crore Six Lakh Seventy Eight Thousand Eight Hundred and Seventy Eight only) inclusive of SB Cess and KK Cess should not be demanded and recovered from them under sub-section (1) of Section 73 of the Finance Act, 1994 for Service Tax

(ii) Interest under the provision of Section 75 of the said Act should not be demanded and recovered from them.

(iii) Penalty under Section 76 of the Finance Act, 1994 should not be imposed upon them for failure to pay the Service tax in accordance with the provision of Section 68 read with Rule 6 of Service Tax Rules, 1994."

2.7 The said show cause notices were adjudicated as per the Order-in-Originals referred in para 1 above.

2.8 Aggrieved respondents have filed appeal before Commissioner (Appeals) which has been allowed as per the impugned order.

2.8 Aggrieved revenue have filed these appeals.

3.1 We have heard Shri Manish Raj learned Authorised Representative appearing for the revenue and Shri Sanjay Kumar learned Counsel appearing for the respondents.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 For dropping the demand, Commissioner (Appeals) has observed as follows:-

"6.1 I have carefully gone through the records of the case, grounds of appeal, enclosure submitted on 23/11/2019 and during the personal hearing. I find that the unsettled

question to be decided here is whether the services provided by the appellant to his overseas clients are classifiable under Online information and database access or retrieval service" (OIDAR) or "information Technology Software Services' as stated during the personal hearing on dated 23/11/2019.

6.2 I peruse the copy of the end user license agreement executed between Acidaes Solution Pvt. Ltd., ("ASPL") & CRM Product company, having its corporate office at Sector-62, Noida -201309, and TIEN PHONG COMMERCIAL JOINTS STOCK BANK "Customer" having its office at Cau Giay Disti, Ha Noi, Vietnam shall make the application software available to its customer as per terms and agreement for usable and user will use the same but can't shared it more than one user, customer shall use the Application software solely for it internal business purposes and shall not (1) license, süblicense, sell, resell, rent, lease, transfer, assign, distribute etc. and send spam or otherwise duplicate or unsolicited messages in violation of applicable laws Fee will be charged as per invoiced (all payment made under the agreement shall be in Dollar) in according with terms & condition and the appellant was responsible for supply of application software to its overseas customer with user licenses along-with maintenance support etc. and customer shall responsible for paying all taxes/charges related thereto.

6.3 On further perusal of the documents submitted by the appellant relating to nature of services provided to the overseas clients, I find that the appellant supplies Application Software (CRMnext) along-with user id and password to the client through e-mail/cloud storage, who downloads the software and installs the same at his end for use by him independently. In Service Tax Educational Guide released by the Board on 19-06-2012 (Official Guidelines for new System of Levy of Service Tex on the *basis of Negative List we.E 01-07-2012), vide para 5.9.1, it is clarified that important features of OIDAR services are that they are completely automated and require minimal human intervention. In OIDAR services, ownership of data/contents is always with the service provider and such data/content is given provided to any customer against a consideration. As per Section 65(75) of the Finance Act - "on-line information and database access or retrieval" means providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network." In the instant case, for the agreed nature of activities undertaken by the appellant, he is not providing any new detail information owned by him but only delivering the application software developed and owned by him through e-mail/cloud storage to the client. CBEC vide circular no 202/12/2016-ST dated 09-11-2016 (para 2, sl. no. 12), with regard to query "Do OIDAR services include all services mediated by information technology over internet or electronic network?" has clarified that -"Using the internet, or some electronic means of communication, just to communicate or facilitate outcome of service does not always mean that a business is providing OIDAR services." In the instant care, the appellant is using electronic communication system (e-mail/server/cloud storage over internet) only to deliver the application software to his clients. From facts and circumstances of the case as discussed above, I find that nature of service provided by appellant to his overseas clients is noticeably different from nature of services defined as OIDAR Services.*

6.4 The department, in support of its contention, has pointed out that during the impugned period, the appellant classified the services provided by him under the category of OIDAR in his registration certificate, service tax returns and invoices. The Hon'ble CESTAT, South Zonal Bench, in case of SPL Developers Pvt. Ltd. vs CST. Bangalore, *reported in [2015 (39) S.TR. 455 (Tri Bang)] has held that "Classification of service - Classification on assumption that registration conclusive of class of service provided-HELD Failure to discharge obligation to correctly classify contested class of service Whore alleged classification contested, the obligation to properly classify service by reference to appropriate taxable service a non- derogable obligation Adjudicating authority or assessee not to decide classification as matter of subjective choice Classification to be on analysis of characteristic of service, analyzed in terms of provisions of Finance Act considered in light of guidance in Section 65A of Finance Act, 1994". On application of the ratio of Hon'ble CESTAT's above verdict, I find that registration or submission of return or issuance of invoices under a category of service is not conclusive to correctly determine the nature of service and its classification. I am, therefore, of the considered view that in the instant case, registration in a category other than actual category is only a procedural lapse which is curable in-nature and substantive benefit should not be denied for such procedural lapse.*

6.5 On examination of the end user agreement' between the appellant and the client as effective during the material period, I find that the appellant has agreed to provide application software to his client on payment of specified fee by the overseas client. As per Section 65(53a) of the Finance Act 1994, "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: "Accordingly, I find that the service provided by the appellant to his overseas customers by way of providing/supplying application software through e-mails/cloud storages is not classifiable *under OIDAR but classifiable under "Information Technology Software Services" for which the place of provision would be governed by provisions of general Rule 3 of POPS Rules, 2012, i.e., location of the recipient of service which is, in the instant case, outside the taxable territory and all benefits of export of services are available to the appellant. Therefore, the impugned order confirming the demand of service tax is liable to be set aside."*

4.3 From the definition of OIDAR, it is evident that for the services classified under this category, the services should be in respect of certain data owned by the service provider, which has been provided by him to the service recipient against the consideration.

4.4 In the present case, we find that respondents do not own any data which has been provided by him to anybody against a consideration for examining the relevant facts. Impugned order has recorded specific findings that the respondents were providing application software developed and owned by him through e-mail. CBIC vide circular dated 09.11.2016 clarified that such services would not be covered under the category of OIDAR just for the reason that the same is provided over internet or provided by some electronic machines of communication.

4.5 This issue have already considered by us in the case of M/s Wildnet Technologies Pvt. Ltd. 2024 (7) TMI 1002-CESTAT ALLAHABAD, wherein following has been observed:-

"7. We find that the Original Authority has held the classification of aforesaid services under OIDAR mainly on the ground that the Appellant has provided electronic data only through computer network and as place of provision of service in the case of OIDAR is place of service provider, the claim of export of services provided to overseas customers was rejected. The short issue in this case is whether services provided by the Appellant during the period 01.04.2015 to 30.11.2016 were classifiable under category of OIDAR. We find that OIDAR service was

defined under Rule 2(l) of the POPS Rules, 2012, during the said period, as below:-

(l) "online information and database access or retrieval services" means providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network;"

8. An insight reading of the above definition reveals that OIDAR service would be that service where data or information for access or retrieval was provided in electronic form through computer network. Term "data" and "information" are defined in the Information Technology Act, 2000 as below:-

"data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;"

"„information" includes data, message, text, images, sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche;"

9. From the above, it is clear that a service which is processed in computer and is stored in memory is called data and information is data, message, images etc. Further, OIDAR service was also defined in para 5.9.5 of the Education Guide issued by the CBIC as below:-

5.9.5 What are "Online information and database access or retrieval services"?

"Online information and database access or retrieval services" are services in relation to online information and database access or retrieval or both, in electronic form through computer network, in any manner. Thus, these

services are essentially delivered over the internet or an electronic network which relies on the internet or similar network for their provision. The other important feature of these services is that they are completely automated, and require minimal human intervention.

Examples of such services are :-

(i) online information generated automatically by software from specific data input by the customer, such as webbased services providing trade statistics, legal and financial data, matrimonial services, social networking sites;

(ii)digitized content of books and other electronic publications, subscription of online newspapers and journals, online news, flight information and weather reports;

(iii) Web-based services providing access or download of digital content.

The following services will not be treated as "online information and database access or retrieval services" :-

(i)Sale or purchase of goods, articles etc over the internet;

(ii) Telecommunication services provided over the internet, including fax, telephony, audio conferencing, and videoconferencing;

(iii) A service which is rendered over the internet, such as an architectural drawing, or management consultancy through e-mail;

(iv)Repair of software, or of hardware, through the internet, from a remote location;

(v)Internet backbone services and internet access services.

As per the above clarifications, OIDAR services are those services which are delivered on internet or an electronic network for access or retrieval.

10. In the present case, we find that „Search Engine Optimization" service was provided by the Appellant, which is a process whereby client's website visibility in search *engines like, Google, Microsoft Bing etc. is increased. The process optimize search engine results of the client"s website. After processing of the website, it is uploaded to client"s server. Website visibility is commonly measured by the placement or ranking of the site on search engine results pages. The above process of search engine optimization is not providing any information and database for retrieval but it is a technological change in website of the client to rank it higher for prospective customers of the client who desires to know about the product or service of the client. Job of the Appellant is limited only to process of website of the client. It is not covered under OIDAR service as in the said process no information is provided for database access or retrieval. It is an improvement process of the website of the client to keep it on higher ranking. It is basically a support service to the clients of the Appellant. Support services as understood in common parlance are provided in relation to business or commerce and for evaluation of prospective customers, telemarketing, processing of purchase orders and fulfillment services. Search engine optimizing services provided by the Appellant are thus more akin to support services. We find support from the decision of the CESTAT in the case of Dewsoft Overseas Pvt. Ltd. [2008(12) S.T.R. 730(T)] where online computer training was provided and the Department classified them under OIDAR but the Tribunal held it to be Commercial Training Service, not OIDAR service. In the case of Philips Electronics India Ltd. [2019 (21) G.S.T.L. 450 (Tri. Chennai)], the Tribunal has held that infrastructural services provided by the Assessee are not classifiable under OIDAR. We further find that in the case of United Telecom Ltd. [2009 (14) S.T.R. 212 (Tri.-Bang.)], the CESTAT has observed as:- 7 Service Tax Appeal No.70487 of 2023*

"7.3 We do not agree with the Commissioner that the ownership of data is not relevant. It is a very relevant

factor. Whenever, there is information and data retrieval, the ownership definitely becomes very relevant. Just because, the appellant provided a part of the network equipment, we cannot say that the appellant was responsible for the entire services. Again the entire wide area network has been established for better communication between the districts and the state headquarters. The information will be flowing form different centers to the headquarters and vice versa. This cannot be equated with online information and data retrieval. In any case, the appellant is not responsible for the entire network because we find that the communication lines have been leased out from the BSNL by the Andhra Pradesh Government. When they are not functioning, the appellants are not responsible and they do not lose their service charges. They are responsible and they do not lose their service charges. They are responsible only for the proper functioning of the equipment supplied by them. Moreover, the data is generated only by the Andhra Pradesh Government and the same is being used by the different wings of the Government, therefore, the appellant has also not provided any data. The responsibility of the appellant is to see that the network (WAN) functions. This cannot be equated with Online database access/retrieval services. Hence, we cannot understand how the Commissioner has come to the conclusion that the appellant provides this service. The Commissioner's reference to Board's Circular with regard to internet service provided is not at all correct. In our view, the said Circular is not relevant and the services provided by the appellant are not similar to those provided by the internet service provider. In this connection, we would like to refer to another taxable introduced with effect from 1.7.2007, it is called Telecommunication Service."

11. In view of the above judicial decisions, we are of the view that „Search Engine Optimization" service would not be classified as OIDAR service.

12. We find that in Google ads service /Pay per click service, the Appellant"s client purchases space from Google and provides advertisement contents to the Appellant who in turn set up the campaign of the client on such space and charges from its client per click wise made by the end customers. The Appellant job is to set up campaign of the client by developing page on Google site.

13. We find that the Appellant only provides digital contents on site of the Google who makes data base and viewers get access or retrieval only from data base of Google. The Appellant does not have any relationship with any viewer, i.e., the person who retrieves or accesses data. The Appellant simple setting up campaign on the Google site hired by its client who uses them for further purposes. OIDAR services are those services which can be accessed by anyone all over the globe. In the instant case, the Appellant provides service only to specific person who in turn uses the same for viewers of world. The nature of service is more akin to Business Support Service. Hence, services in question are not under OIDAR category.

14. The Appellant is also engaged in development of Mobile apps and web design & development activities for its clients. Mobile application development is the process of making software for smart phones, tablets and digital assistants. The software can be preinstalled on the device, downloaded from a mobile app store or accessed through a mobile web browser. It is not an information and database for retrieval but it is software development activities for further operation. Hence the same cannot be classified under OIDAR. Web development services encompass creating, building, and maintaining websites or web applications. It combines technical skills, programming languages, and design elements to develop functional and *visually appealing online platforms. The above service is limited to clients only who order to develop such software to the Appellant. The world wide viewers click the said software on the website of the clients. The said services cannot be considered to be OIDAR services.*

15. Once the classification of said services is not covered under OIDAR services, the place of provision in respect of service being rendered by the Appellant is outside India in respect of which export has been claimed. The place of provision Rule 9(b) of the POPS Rules, 2002 would not be applicable in the present case.

4.6 In view of the above discussions and findings, we do not find any merit in the appeal filed by the revenue.

5.1 Appeals are dismissed.

(Operative part of the order pronounced in open court)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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