

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 26809 of 2013

(Arising out of Order-in-Original No.37/2013-ST(Commr.) dt. 06/03/2013
passed by Commissioner Of Central Excise and Service Tax (LTU), Bangalore)

M/s. Hewlett Packard India Sales Private Limited,
No.24, Sallarpuria Arena,
Hosur Main Road,
Adugodi,
Bangalore – 560 030.

..... **Appellant(s)**

VERSUS

Commissioner of Central Excise and Service Tax (LTU),
JSS Towers, 100ft Ring Road,
Banashankari 3rd Stage,
Bangalore – 560085.

.....**Respondent(s)**

AND

Service Tax Appeal No. 21336 of 2015

(Arising out of Order-in-Original No.BLR-LTUNT-000-COM-094-2014-15
dt.10/11/2014 passed by Commissioner Of Central Excise and Service
Tax(LTU), Bangalore)

M/s. Hewlett Packard India Sales Private Limited,
No.24, Sallarpuria Arena,
Hosur Main Road,
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Bangalore – 560 030

..... **Appellant(s)**

VERSUS

Commissioner of Central Excise and Service Tax (LTU),
JSS Towers, 100ft Ring Road,
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Bangalore – 560085.

.....**Respondent(s)**

Appearance:

Mr. Ravi Raghavan, Mrs. Neethu James, Ms. Meghana Lal and Ms. Ayushree Jhawar, Advocates for the appellant.
Mr. P. Saravana Perumal, Addl. Commissioner (AR) for the respondent.

Coram:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 20014-20015 / 2024

Date of Hearing: 23.08.2023

Date of Decision: 01.01.2024

Per: Dr. D.M.Misra

These two appeals are filed against the respective impugned orders passed by the Commissioner of Central Excise and Service Tax (LTU), Bangalore, since common issues involved, both appeals are taken up for hearing and disposal.

2. Briefly stated the facts of the case are that the appellant are engaged in the manufacture, trading and servicing of computer systems, CPU, servers etc., falling under Chapter 84 of Central Excise Tariff Act, 1985. During the course of audit, it was noticed that the appellant was providing output services under the category of 'Management, Maintenance or Repair Service' (MMR service for short) either under warranty period or under Annual Maintenance Contract (AMC). They procured parts and spares on which cenvat credit was availed. The appellants are discharging service tax on AMC service; however, no service tax was paid for services rendered during warranty period even though defective components were replaced and the cost of the said components charged from their overseas entities, who in-turn, recovered

the cost of the same from the Original Equipment Manufacturer (OEM). Consequently, show-cause notices dated 30.09.2011 for the period April 2006 to March 2008 and dated 22.10.2013 for the period April 2008 to March 2013 were issued to the appellant for recovery of the service tax for services rendered during the warranty period even though no consideration was received from the service receivers but the value of the said services has been arrived at on the basis of Rule 3 of Service Tax (Determination of Value) Rules, 2006 read with Section 67 of the Finance Act, 1994 equivalent to spare parts value, replaced free of cost. On adjudication, demands have been confirmed with interest and penalty was imposed. Hence, these appeals.

3.1. Learned advocate for the appellant, at the outset, has submitted that during the periods in dispute, they have discharged service tax in respect of AMC service; however, no service tax was paid for services rendered during the warranty period of the sold equipment as no consideration was received. In respect of AMC service, the appellant upto July 2012 paid service tax on the entire value charged to the customers and availed cenvat credit on inputs and input services used in such AMC services. From 01.07.2012, they paid service tax on the gross-value in terms of Rule 2A of the Service Tax Valuation Rules and not availed cenvat credit on the duty paid spares / inputs used in providing such services. Also, the Department has been raising periodical demands on the indent commission received by the appellant for the warranty services provided to foreign entities from March 2005 to September 2014 under BAS and MMR service. The first show-cause notice was issued to them on 30.09.2011 for providing warranty support services during April 2006 to March 2008 under the category of MMR service. The second show-cause notice was issued on 22.10.2013 demanding service tax on warranty

support service for the period April 2008 to March 2013 and the said demand was on the value of cost of spares used in providing support service.

3.2. The learned advocate vehemently argued that since the appellant has not received any consideration for providing the warranty services; therefore, no service tax is attracted on the services provided during the warranty period. It is his contention that for the period prior to 01.07.2012, Section 65 of the Finance Act provides for levy of service tax only where the provision of service is against consideration of the service provided. In absence of any consideration, no service tax is leviable. For the period after 01.07.2012, Section 66B read with Section 65B (44) of the Finance Act provides for levy of service tax on service which is defined as an activity for consideration. Therefore, in absence of consideration, no service tax is leviable on the activity of providing repair service during the warrant period. In support, he has relied upon the following judgments:

- i. CCGST&CE Vs. Edelweiss Financial Services (Civil Appeal Diary No.5258/2023)*
- ii. CST Vs. Bhayana Builders (P) Ltd. [2018(10) GSTL 118 (SC)]*
- iii. Commissioner Vs. Larsen and Toubro Ltd. [2016(44) STR 391 (Guj.)]*

3.3. Elaborating his argument, the learned advocate submitted that during warranty period services, the entire consideration is being received from the customers being included in the sale price of the goods and tax already paid on the sale of goods. Thus, the cost for providing warranty service is part of profit margin in the goods traded and has already suffered VAT. The same cannot be subjected to service tax by

way of artificial segregation. In support, he has referred to the following judgments:

- i. CCE, Cochin Vs. Popular Mega Motors (India) Ltd. [2018(18) GSTL 219 (Ker.)]**
- ii. My Car Pvt. Ltd. Vs. CCE, Kanpur [2015(40) STR 1018 (Tri. Del.)]**
- iii. CCE, Indore Vs. Jabalpur Motors Ltd. [2014(36) STR 1160 (Tri. Del.)]**
- iv. CCE&C, Nashik Vs. Automotive Manufacturers Ltd. [2016(42) STR 448 (Tri. Mum.)]**
- v. Indus Motor Company Vs. CCE, Cochin [2008(9) STR 18 (Tri. Bang.)]**
- vi. ASL Motors Pvt. Ltd. Vs. CCE & ST, Patna [2008(9) STR 356 (Tri. Kolkata)]**
- vii. Hindustan Auto House (P) Ltd. Vs. CCE, Jaipur [2009(13) STR 190 (Tri. Del.)]**

3.4 Further he has submitted that the provisions of Section 67 read with Rule 3 of the Service Tax Valuation rules does not provide for determination of value in case of free service / service provided without consideration. It is his contention that since the warranty service is provided free, no value can be attributable to the service in terms of Section 67 of the Finance Act, 1994. Assailing the findings recorded in the impugned order, which holds that if the consideration is not ascertainable, then recourse is to be made to Section 67(4) read with the Valuation Rules, he has submitted that Section 67(4) of the Finance Act lays down that value shall be determined in the prescribed manner i.e. according to Rule 3 of Service Tax (Determination of Value) Rules, 2006. It is his contention that when Section 67 does not provide for determination of value in the absence of consideration, the learned Commissioner erred in applying the said rule in confirming the demands. In support, he referred to the judgment of the Hon'ble Supreme Court in

the case of ***CST Vs. Bhayana Builders (P) Ltd. [2018(10) GSTL 118 (SC)]***. It is his contention that Section 67(1)(iii) of the Finance Act, 1994 applies only where the provision of service is for consideration and such consideration is not ascertainable and in the instant case, there is no consideration; therefore, the entire demand is to be set aside.

3.5. Further he has submitted that the Department has wrongly adopted Rule 3(b) of the Valuation Rules 2006 to ascertain the value of non-monetary consideration. In the present case, there is no non-monetary consideration to be converted into equivalent of money; hence, the said rule is inapplicable.

3.6. He has further submitted that the demand has been raised under the MMR service, which admittedly involves sale of goods during the provision of said service. Thus, the demand, if any be raised under the category of Works Contract Service upto 01.07.2012 and demand on the said category is not legally tenable. In support, he placed reliance on the decision of this Tribunal in the case of ***Ford India Pvt. Ltd. Vs. CC, Chennai [2023-VIL-751-CESTAT-CHE-ST]***. For the period after 01.07.2012, demand for Works Contract Service, if any, has to be in terms of Rule 2A and not in terms of Rule 3 of Service Tax Valuation Rules.

3.7. Further he has submitted that the quantification of the demand is not correct as the Department has adopted the entire value attributable to the free warranty service in addition to the cost of materials and quantified the demand. Further he has submitted that during the provision of warranty service, the appellant released the replacement parts to replace the defective parts. The cost of such defective parts is reimbursed by the OEMs to the foreign companies, who in turn compensates the appellant. Thus, the entire transaction is relating to

sales or purchase of components and is not for any service activity as alleged by the Department. He has submitted that the value of spare parts used for providing free warranty services cannot be included in the taxable value for service tax. In support, he has referred the decision in the case of ***TAFE Access Limited Vs. CGST&CE [2023(5) TMI 1154 – CESTAT Chennai]***.

3.8. Further he has submitted that the appellant is eligible for cum-tax benefit. In support, he has referred the judgment of Hon'ble Supreme Court in the case of ***CCE, Delhi Vs. Maruti Udyog Ltd. [2002(141) ELT 3 (SC)]***.

3.9. Further he has submitted that extended period of limitation cannot be invoked as the appellant has not suppressed any material facts with intent to evade payment of tax. Therefore, the demand for the period in the first show-cause notice is barred by limitation. Further he has submitted that the second show-cause notice issued for the extended period is contrary to the principles of law laid by the Hon'ble Supreme Court in the case of Nizam Sugar Factory Vs. CCE [2006(197) ELT 465 (SC)]; hence bad in law. It is further submitted that there has been no delay on their part in submitting the data; it was demanded on 27.03.2013 and they submitted it on 22.07.2013.

4. The Learned Authorised Representative (AR) for the Revenue reiterated the findings of the learned Commissioner.

5. Heard both sides and perused the records.

6. The short issue involved in the present appeal for determination is whether:

- i. Service tax is payable by the appellant for providing services to the customers during warranty period through third party

arrangement under the taxable category of 'Management, Maintenance or Repair Service';

- ii. Applicability of service tax on compensation received from OEMs on replacement of defective parts under Management, Maintenance or Repair service; and
- iii. Demands raised for extended period are sustainable and penalty imposable.

7. The facts are not in dispute. The appellant, post-sale of the computer systems, servers etc., provided free services during warranty period and also paid service tax for the services provided through AMC to customers; and these services have been provided by the appellant through third parties. On AMC service, the appellant had discharged service tax and there is no dispute on the same. It is also an admitted fact that no consideration has been received by the appellant from the customers for providing services during warranty period even though the defective parts had been replaced free of cost. This fact also has been acknowledged by the Commissioner in the finding.

8. The learned Commissioner however after analysing the provisions of Section 67 of Finance Act, 1994 and Rule 3 of the Service Tax (Determination of Value) Rules, 2006 held that even though no consideration flows from the customers, however, by reading the valuation provisions, the service tax liability on the cost of defective parts replaced during the period can be fastened to the appellant in the absence of value of consideration for the service received. He has recorded his reasoning as follows:-

17.3. From the aforesaid provisions, it becomes clear that as per Rule 3 of the Service Tax (Determination of Value) Rules, 2006,

the value determined by the service provider, in the instant case M/s. HP India, for the purpose of payment of service tax should not be less than the cost of provision of such services (emphasis supplied), and where the Central Excise Officer is not satisfied with the value adopted, he can verify the documents and records of the service provider in terms of Rule 4(1) ibid and issue a notice thereafter to the service provider demanding the service tax determined by him, as per law, in terms of Rule 4(2) ibid. Though no consideration was received towards provision of service within the warranty period, I hold that M/s. HP India are liable to pay service tax on such services rendered by them on the value determined in accordance with the provisions of Section 67 of the Finance Act, 1994 read with Rule 3 of the Service Tax (Determination of Value) Rules, 2006. Since consideration of taxable service provided should not be less than the cost of provisions of such service in terms of Rule 3 ibid, based on the cost of such spares used in providing warranty support services and the credit availed thereon and the value of all services of the third party engaged in providing warranty support services and details of service tax credit availed thereon as furnished by M/s. HP India vide their letter dt. 22.07.2013., the service tax liability totally amounting to Rs.80,36,71,458/- (inclusive of cess) for the period from April 2008 to March 2013 at the rates specified under Section 66 of the Finance Act, 1994 and Section 66B of the Finance Act, 2012 (w.e.f. 01.07.2012) as envisaged under Section 68(1) ibid, has been worked out. Accordingly, in view of the aforesaid facts, I hold that M/s. HP India are liable to pay the service tax totally amounting to Rs.80,36,71,458/- (inclusive of cess) on the

warranty support service, classifiable under 'Management Maintenance and Repair Service' rendered by them during the period from April 2008 to 30.06.2012 and as 'service' under Section 65B(44) for the period from 01.07.2012 to March 2013. I also hold that they are liable to pay interest at applicable rates under Section 75 of the Finance Act, 1994, on the amount of Rs.80,36,71,458/- not paid by them.

9. On careful analysis of the said reasoning, we do not find merit inasmuch as in the absence of consideration for providing any service, the determination of value in terms of Rule 3 holding such value being not ascertainable be determined in the manner provided under clause (a) or clause (b) of the said sub-rule is fallacious and misunderstanding of the very concept of levy of service tax. It is an incorrect approach of the adjudicating authority that the consideration be determined by resorting to valuation when no such consideration is received from the customers for providing services during warranty period. It is not the case of the department that the Appellant though received value of the services but the same could not be quantified or ascertained, hence resort to the method of valuation becomes necessary. It is a case of non-receipt of any consideration for the service rendered. Recently, the Hon'ble Supreme Court in the case of **CGST&CE Vs. Edelweiss Financial Services [2023(73) GSTL 4 (SC)]** held as follows: -

5. The Counsel would next advert to Paragraph 3.1.12 of the Commissioner's order where the following was recorded: -

"Further, the consideration can be of two types viz., monetary consideration and non-monetary consideration. In the present case, the Assessee has argued that they have not received any consideration. In such case it's for the department to prove that

the Assessee's claim is wrong. It is observed that nowhere in the Show Cause Notice, attempt has been made to prove that the Assessee received either monetary or non-monetary consideration in any form. It is not alleged or proved in the Show Cause Notice as to how the Assessee got any benefit from their subsidiaries in monetary or non-monetary terms for the Corporate Guarantees issued. Missing this vital point, valuation of the consideration using provisions of Section 67(1) of the Finance Act, 1994 become a futile exercise."

6. Mr. Rai Chandani then read paragraphs 8 and 9 of the judgment of the Tribunal, which are extracted below:-

"8. The criticality of 'consideration' for determination of service, as defined in section 65B (44) of Finance Act, 1994, for the disputed period after introduction of 'negative list' regime of taxation has been rightly construed by the adjudicating authority. Any activity must, for the purpose of taxability under Finance Act, 1994, not only, in relation to another, reveal a 'provider', but also the flow of 'consideration' for rendering of the service. In the absence of any of these two elements, taxability under section 66B of Finance Act, 1994 will not arise. It is clear that there is no consideration insofar as 'corporate guarantee' issued by respondent on behalf of their subsidiary companies is concerned.

9. The reliance placed by Learned Authorised Representative on the 'non-monetary benefits' which may, if at all, be of relevance for determination of assessable value under section 67 of Finance Act, 1994 does not extend to ascertainment of 'service' as defined in section 65B(44) of Finance Act, 1994. 'Consideration' is the

recompense for the 'contractual' undertaking that authorizes levy while 'assessable value' is a determination for computing the measure of the levy and the latter must follow the former."

7. The above would suggest that this was a case where the assessee had not received any consideration while providing corporate guarantee to its group companies. No effort was made on behalf of the Revenue to assail the above finding or to demonstrate that issuance of corporate guarantee to group companies without consideration would be a taxable service. In these circumstances, in view of such conclusive finding of both forums, we see no reason to admit this case basing upon the pending Civil Appeal No. 428 @ Diary No. 42703/2019, particularly when it has not been demonstrated that the factual matrix of the pending case is identical to the present one.

Since no consideration has been received the service provided by the appellant during the warranty period, hence confirmation of service tax under the taxable service of Management, Maintenance or Repair cannot be sustained.

10. The next issue relates to confirmation of demand of Rs.5,78,742/- on the compensation received by the appellant from the OEMs during the relevant period on the defective parts replaced by them from their stock warehouse on the advice of the service engineers during the course of repair of equipment during the warranty period. The defective parts were reexported in terms of the warranty provided by the OEMs and the cost of the said parts was reimbursed by the OEMs to the foreign manufacturer of the equipment, who in turn compensates the appellant. The learned Commissioner referring to Rule 5(1) of the Service Tax Valuation Rules,

2006 held that the gross amount charged in rendering the services also includes the value/cost of the goods and materials used/consumed/replaced during the course of provision of the service. Consequently, he confirmed the demand under MMR service. The issue is no more res integra and covered by the judgement of this Tribunal in the case of **TAFE Access Limited Vs. CGST&CE [2023(5) TMI 1154-CESTAT Chennai]**. In the said case, the Tribunal, following the principle laid by the Hon'ble Supreme Court in the case of **UOI Vs. Intercontinental Consultants and Technocrats Pvt. Ltd. [2018 (10) GSTL 401 (SC)]**, held that reimbursable expenses cannot be included in the taxable value. Following the said judgment and the principles laid down by the Supreme Court, we are also of the view that confirmation of demand of service tax Rs.5,78,742/- on reimbursement of cost of defective parts replaced during the warranty period cannot be sustained.

11. In the result, the impugned orders are set aside and the appeals are allowed with consequential reliefs, if any, as per law.

(Pronounced in open court on 01.01.2024)

(D.M. MISRA)
MEMBER (JUDICIAL)

(PULLELA NAGESWARA RAO)
MEMBER (TECHNICAL)

Raja...