

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

REGIONAL BENCH-COURT NO. I

Service Tax Appeal No. 564 of 2012

(Arising out of Order-in-Original No. 04/2011 dated 30.11.2011 passed by the Commissioner of Central Excise, Bangalore)

M/s SAP India Pvt. Limited

Appellant

Wing A, 2nd Floor, Tower-B
Salarpuria Softzone
Sarjapur Outer Ring Road
Ballandur Post, Bangalore-560103.

Versus

Commissioner of Central Excise

Respondent

Bangalore-II, P.B. No. 5400
Central Revenue Building
Bangalore-560001.

AND

Service Tax Appeal No. 1509 of 2012

(Arising out of Order-in-Original No. 34/2011 dated 20.12.2011 passed by the Commissioner of Central Excise, Bangalore)

M/s SAP India Pvt. Limited

Appellant

Wing A, 2nd Floor, Tower-B
Salarpuria Softzone
Sarjapur Outer Ring Road
Ballandur Post, Bangalore-560103.

Versus

Commissioner of Central Excise

Respondent

Bangalore-II
Central Revenue Building
Bangalore-560001.

Appearance

Shri Prakash Shah with Shri Mihir Mehta, Advocate - for the appellant
Shri Rama Holla, Superintendent (AR) - for the respondent

CORAM: HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

Date of Hearing: 25.02.2020
Date of Decision: 15.12.2020

Final Order Nos. 20842 – 20843 /2020

Anil Choudhary:

By the impugned orders in the above appeals, the respondent has confirmed the demand of service tax on the licence fee paid to SAP AG, Germany, for grant of non-exclusive licence to use, market and sub-license the software, third party database and third-party software to ‘end user’ in the territory, on ‘reverse charge basis’ under the taxable head “Franchise Services” from 18.04.2006 onwards.

2. The services received are classified by Revenue as “Franchisee service” in the impugned orders, and the demand is for the period April 2006 to March, 2008 and is quantified at Rs. 79,07,67,027/-. Apart from this demand, there is interest and also penalty imposed vide the impugned orders.

Show Cause Notice dated	Service Tax Appeal No.	Period	Tax demanded (Rs.)	Penalty (Rs.)
16.01.2007	564 of 2012	01.07.2003 to 31.03.2006	Nil (as rule 66A was enacted w.e.f. 18.04.2006)	
23.10.2008	1509 of 2012	April, 2006 to March, 2008	79,07,67,027/-	79,07,67,027/-

3. The appellants – SAP India are engaged in marketing and licensing of the popular software known as “my SAP” along with other related software products of M/s SAP Aktiengesellschaft Systems, Germany. They do software marketing and licensing, maintenance,

consulting and training services. There is an agreement between the appellant and SAP AG, Germany. Subject to the terms of the agreement, SAP AG granted to the appellant a non-exclusive license to use, market, sub-license the software, documentation, 3rd party data base and 3rd party software to end users in the territory, as assigned to the appellants, which are/ is predominantly India. In consideration of the above licenses and permissions, the appellant was required to make certain payments to SAP AG, Germany which was mostly from consideration received from the clients to whom the software was marketed. In this proceeding, Revenue is seeking to tax such payments made, under provisions of Section 66A of Finance Act, 1994 (reverse charge mechanism), on the basis that the appellant was receiving franchisee service from SAP AG, Germany, and when they were dealing with the clients in India who use SAP software, they were acting as franchisee of SAP AG, Germany.

4. The Counsel for the appellant submits that the payments made to SAP AG, Germany is towards licensing of the software developed by SAP AG, Germany. The payment is also towards charges of continuous upgradation of the software, that is being done by SAP, Germany which is being passed on to the licensees (end users) as per the agreement at the time of licensing, for which they continue to make payment as per the agreement. He argues that this activity amounts to 'licensing of copyrights' and it cannot be brought under the definition of 'franchisee service', and therefore, the demand made is not sustainable.

5. The Counsel for the appellant submits that the said activity became taxable with effect from 16.05.2008 under the head 'Information Technology Software Service' (ITSS), and the appellant has been paying service tax under this head from the said date. He also points out that the classification of the service received by the appellant has to be same as the classification of the service rendered by them, because of the nature of the activities are the same in the hands of both. He points out that the Department had earlier issued demands under the category "Management Consultant Service". The adjudication order in the matter was set aside by this Tribunal vide Final Order No. 261/2007 dated 23.02.2007. Later demands proposing classification of the service under 'Maintenance and Repair Service' was issued and the demand was finally dropped by the Tribunal vide final order reported at 2010-TIOL-1569-CESTAT-BANG. Para 4.1 of the order records - orders set aside for period prior to the said order. Now for the latter period, Revenue has come up with proposal to classify the service in a third category, that is, as 'Franchisee Service'. The Counsel argues that since a new entry clearly specifying the activity to be taxable under section 65(105)(zzzze), ITSS, has been incorporated in Finance Act, 1994 w.e.f. 16.05.2008, there is a legal presumption that the said service was not covered by any taxable entry prior to that date. This is the principle laid down in many decisions and relied in the case of the appellants as referred to above.

6. Regarding the merits of the classification under 'franchisee service', he points out that from 16.06.2005, franchise service is defined under Section 65(47), Section 65(48) and Section 65(105)(zze) which are reproduced below:

- Section 65(47): "Franchise" means an agreement by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved;
- Section 65(48): "Franchisor" means any person who enters into franchise with a franchisee and includes any associate of franchisor or a person designated by franchisor to enter into franchise on his behalf and the terms "franchisee" shall be construed accordingly;
- Section 65(105)(zze): "Taxable service" means any service provided or to be provided to a franchisee, by the franchisor in relation to franchise;

7. According to the Counsel, the appellant is not selling the software, but is only granting a license to use the software. Further they are not doing any service or process identified with the SAP, Germany, when they are passing on the updates to the software as development by SAP, Germany. A franchisee, sells or manufactures goods representing himself to be of the same capacity as the franchisor. While licensing the software they do not represent themselves to be SAP Germany. They Act only as their agents. In the case of franchise service, the franchisee actually provides the service of the same quality as is provided by the franchisor, and the franchisor controls the quality of the services through their own control mechanisms. In the case of sale of a product manufactured by one person to another person, an intermediary cannot be considered as a franchisee. Therefore, the activities which are

impugned in the present proceeding, in the first place, is not a sale but only licensing of software and secondly if at all it is a sale, they are only acting as a selling agent and not as a franchisee of SAP, Germany and, therefore, no service tax can be levied under the head of 'Franchisee services'.

8. The Counsel points out that for the business consultancy arrangement for implementation of SAP software, which services they render to their clients, they are paying service tax and there is no payment to the principals in Germany in respect of such services and there is no dispute involved in the present case in respect of such services. According to him payments are made to SAP AG, Germany only under three articles of the agreement which are the following:

- (i) Under Article 6.1. this payment is for license fees for the software developed by SAP AG, Germany and third party databases and third party software which their principal is authorised to license to other end users.
- (ii) Under Article 6.2. This is for support services for software which is essentially for upgradations in the software and also for fixing technical difficulties encountered while using the software.
- (iii) Under Article 3.7.2. This payment is on account of use of SAP software and third party software by appellants themselves, that is for the copies licensed for use by the appellants.

The Counsel for the appellant submits that these payments can in no way be considered as charges for franchise. Further urges, that extended period of limitation is not available in the facts and circumstances.

9. Opposing the prayer of the appellants, the authorised representative for the Revenue submits that the appellants are representing SAP, Germany, in India. They are marketing the software in India and realizing the consideration from the clients. Out of this consideration realised, a part thereof is remitted to SAP, Germany as 'Royalty'. This payment is towards the representational right granted by SAP, Germany, to sell the software in India and for doing the process of customization of the software for each customer. The entire activity of implementation of SAP software is a process identified in India with SAP, Germany and the appellant is doing this process as a representative of SAP, Germany under the guidance received by the appellant, though it is represented as consideration for licensing of the software and for cost of continuous upgradation. According to him, the appellants are acting as a franchisee of SAP, Germany and, therefore, the impugned order confirming the service tax demand is maintainable. He further relies on the ruling in **Timken India Limited vs. CCE, Jamshedpur -2018 (11) TMI 1382- CESTAT Kolkata.**

10. Having considered the rival contentions, we find that the appellant is making payment to SAP, Germany in terms of Article 6.1, 6.2 and 3.7.2 of the agreement between them, noticed hereinabove which is payment towards license fee for use of software by the client in India for the software developed by SAP, Germany and 3rd party database / software and also towards support services for software which is essentially for upgradation of the software and for fixing technical

difficulties encountered while using the software. Amount paid under Article 3.7.2 is for use of SAP software by appellant itself to SAP, Germany. We find that the services squarely covered in the forecorners of the definition of Information Technology Software Service as defined under Section 65(105)(zzzze) of the Finance Act, 1994, which was brought on statute w.e.f. 16.05.2008.

10.1 We further find that the same activity of the appellant was earlier classified under Consulting Engineer Service for the period 07.07.1997 to 27.02.1999 which was upheld by this Tribunal vide order reported as **2006 (1) STR 152**, thereafter, there was exemption from March, 1999. Subsequently, for the period 16.10.1997 to 31.03.1998 the said activity was classified as Management Consultant Service which was also set aside by this Tribunal vide Final Order dated 14.08.2006 reported at **2007 (210) ELT 64**, following the earlier order classifying as Consultant Engineer Service.

11. Again vide order-in-original dated 16.06.2017 the Principal Commissioner of Service Tax, Bangaluru wherein service tax demand for the period April, 2004 to September, 2004 and March, 2006 was proposed to be charged under 'Management Consultant Service' and also vide another show cause notice for April, 2006 to March, 2007, demand was proposed and also vide third show cause notice for the period April, 2007 to March, 2008, the demand was proposed, taking notice of the order of this Tribunal, was pleased to drop the demands.

11.1 Further, admittedly the appellant is paying service tax under the head Information Technology Software Service w.e.f. 16.05.2008 which is not disputed by the Department. It is an accepted principle laid down by the Apex Court in **Commissioner of Service Tax vs. Federal Bank Limited – 2016 (42) STR 418** wherein affirming the order of the Kerala High Court that there was new head of service tax noticed and unless the same is carved out from the existing entry, the service tax under the said head cannot be said to be exigible prior the date of its enactment under any other existing head. Accordingly, we hold that the service in question is not taxable under the head 'franchisee service' rather taxable under Information Technology Software Service. Accordingly, both the appeals are allowed and the impugned orders are set aside. The appellant is entitled to consequential benefits, in accordance with law.

(Pronounced in Court on **15/12/2020**)

(Anil Choudhary)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

Pant