

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

**Service Tax Appeal No. 1717 Of 2011**

[Arising out of OIA No. 09/ST/Apl/DLH-IV/2011 dated 30.08.2011 passed by the Commissioner (Appeals) of Central Excise, Delhi-IV]

**Yamaha Motor Solutions India Pvt. Ltd. : Appellant (s)**

1<sup>ST</sup> Floor, The Great Eastern Center 70,  
Nehru Place, Behind IFCI Tower, New Delhi

Vs

**CCE & ST- Delhi-IV : Respondent (s)**

New CGO Complex, NH-IV, Faridabad,  
Haryana

APPEARANCE:

Shri Tanuj Hazari, Advocate for the Appellant

Shri Raman Mittal, Authorised Representative for the Respondent

**CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)**  
**HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

**ORDER No. A/60043/2024**

Date of Hearing: 30.10.2023

Date of Decision: 06.02.2024

***Per : S. S. GARG***

The present appeal is directed against the impugned order dated 30.08.2011 passed by the Commissioner (Appeals) whereby the Learned Commissioner (Appeals) has rejected the appeal of the appellant and upheld the order-in-original.

2. Briefly the facts of the case are that the appellant was a 100% subsidiary of Yamaha Motor India Pvt. Limited (herein after referred as to Yamaha India) during the period under consideration. It was engaged in the business of rendering software development and other information technology services to Yamaha India.

2.1 The appellant has received a show cause notice dated 28.05.2004 from the Assistant Commissioner (Anti- Evasion) answerable to the Assistant Commissioner of Service Tax, Faridabad, wherein it was alleged that the appellant's services to the Yamaha India are taxable under the category of consulting engineer's service.

2.2 The appellant filed a detailed reply to the show cause notice and explained that its activities were exempted from tax through notification 04/1999-ST dated 28.02.1999, as these services are in relation to computer software.

2.3 After following due process, the Additional Commissioner of Service Tax, New Delhi adjudicated the subject show cause notice and confirmed the demand as proposed in the said show cause notice by observing that the activities fall within the taxable category of consulting engineer's service. The Additional Commissioner has denied the benefit of the exemption Notification No. 04/1999-ST dated 28.02.1999 on the ground that the appellant's activities are not predominantly in the nature of software development only. He has also imposed penalties as proposed in the show cause notice.

2.4 Aggrieved by the said order, the appellant filed appeal before the Commissioner of Central Excise (Appeals) Delhi – IV, Faridabad who has rejected the appeal of the appellant and has confirmed the demand of service tax on the ground that the activities of the appellant are not exclusively related to computer software service. The Commissioner (Appeals) has also confirmed the demand of interest and penalty.

2.5 Hence, the present appeal.

3. Heard both the parties and perused the material on records.

4. Learned Counsel for the appellant submits that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submits that during the relevant period, only an Assistant Commissioner or a Deputy Commissioner having jurisdiction over the Assessee could pass an assessment order and the Additional Commissioner had no jurisdiction to decide the matter.

4.1 He further submits that Rule 3 of the Service Tax Rules, 1994, authorizes the Central Board of Excise and Customs (CBEC) to appoint such Central Excise Officers as it thinks fit for exercising the powers under Chapter V of the Finance Act within such local limits as it may assign to them, as also specify the taxable service in relation to which any such central excise officer shall exercise his powers.

4.2 He further submits that CBEC has appointed several officers through its service tax order no. 1/1/94 dated 29.07.1994 as amended from time to time. Under this order, officers were appointed for the purpose of assessment and collection of service tax. He further submits that once an officer has been designated to be entrusted with the power of assessment and collection of service tax in a local area, it should be presumed that no other officer should have jurisdiction to exercise powers of assessment and collection of such tax.

4.3 He further submits that during the relevant period, the appellant was not liable to payment of service tax as its activities were exempted from payment of service tax under the category of consulting engineer's service through Notification No. 04/1999-ST dated 28.02.1999.

4.4 He also referred to CBEC Circular No. 70/19/2003-ST dated 17.12.2003 which clarified that the taxable service provided to any

person by a consulting engineer in relation to computer software is exempted, and therefore, activities relating to maintenance of computer software are not taxable.

4.5 Learned Counsel further submits that the appellant provided the services in relation to computer software and therefore exempted from service tax.

4.6 Learned Counsel referred to the various clauses of the agreement to show that the services provided by the appellant are in relation to software services which include operation/development and facilitation of software and the said services are necessary for the proper usage of the software.

4.7 Learned Counsel further referred to the observation of the Tribunal in the case of Nokia (India) Pvt. Ltd. vs. CCE, 2006 S.T.R 233 (Tri.-Del.) which elaborately described that the activities of software engineer are not confined to software development only. Further, the software engineers helps in systems development and designs, constructs, test and maintains computer application software and systems and solve all technical problems that arise during its operation.

4.8 He further submits that as per the written submissions filed by the department whereby which they want the activities of the appellant to fall under the service category as provided in Section 65(105) (zzzze) of Finance Act, 1994.

4.9 To counter this, the Learned Counsel submits that Information Technology Software Service was inserted in the Finance Act w.e.f. 16.05.2008 only whereas the period of dispute is from 01.10.2002 to 12.03.2004, therefore, there cannot be any liability to discharge service tax under this category. He also submits that the extended

period cannot be invoked because there is no suppression of fact, misrepresentation and collusion or fraud by the appellant.

4.10 As regards the penalty, the Learned Counsel submits that the present case involves interpretation of complex legal provisions and therefore, the imposition of penalty is not warranted in the present case.

5. On the other hand, the Learned Authorized Representative reiterated the findings in the impugned order.

6. After considering the submissions of both the parties and perusal of material on record, we find that as regards the objection raised by the appellant regarding the competency of the Additional Commissioner to adjudicate and finalize the assessment, the Learned Additional Commissioner has observed in Order-in-Original dated 31.03.2008 vide Corrigendum dated 10.02.2007, the Adjudicating Authority was changed to "The Additional Commissioner of Service Tax 17-B-IAEA M.G.Road, New Delhi.

6.1 Further, we find that the Commissioner (Appeals) has also considered this issue of jurisdiction of Additional Commissioner and referred to Section 83 of the Finance Act, 1994 and Section 12E of the Central Excise Act, 1944 to hold that the Additional Commissioner had jurisdiction to adjudicate the show cause notice issued by the Assistant Commissioner. In this regard, we may refer to Section 83 of the Finance Act, 1994 which is reproduced herein below:-

(83. Application of certain provisions of Act 1 of 1944-The provisions of the following section of the Central Excise Act, 1944 (1 of 1944), as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise:-

9C, 9D, 11B, 11BB, 11C, 12,] 12A], 12B. 12C, 12D, 12, 14, 14AA.

15. 33A, 35F, 35FF to 35-O (both inclusive), 35Q, 36, 36A, 368, 37A, 37B. 37C, 37D, 38A and 40.

I further note that Section 12E of the Central Excise Act, 1944 reads as under:

*SECTION 12E. Powers of Central Excise Officers. (1) A Central Excise Officer may exercise the powers and discharge the duties conferred or imposed under this Act on any other Central Excise Officer who is subordinate to him.*

*Admittedly, the determination of duty had been done by the Additional Commissioner of Central Excise and the Assistant Commissioner of Central Excise (Service Tax in this case) is subordinate to the and as such I do not find anything contrary to law as far as adjudication by the Additional Commissioner is concerned.)*

6.2 In view of the above stated position, we do not find any infirmity in the jurisdiction of the Additional Commissioner to adjudicate the show cause notice.

6.3 As regards, the second ground raised by the Learned Counsel for the appellant that during the relevant period, the appellant was entitled to the benefit of exemption Notification No. 04/1999-ST dated 28.02.1999 as the activities of the appellant were in relation to computer software which were exempted from payment of service tax. In this regard, we may reproduce the extract of the Notification No. 04/1999-ST dated 28.02.1999:-

***"Service Tax- Exemption to services provided by a consulting engineer in relation to Computer software***

*In exercise of the power conferred by section 93 of the Finance Act, 1994 (32 of 1994). the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service provided to any person by a consulting engineer in relation to computer software, from the whole of the service tax leviable thereon under section 66 of the said Act."*

6.4 Further, we may also reproduce the Circular No. 70/19/2003-ST dated 17.12.2003 issued by the CBEC which is as under:-

Circular No. 70/19/2003-ST  
Dec 17, 2003

F.No. 256/9/2003-CX-4  
Government of India  
Ministry of Finance  
Department of Revenue

Subject : clarification on the taxability of maintenance of Computer Software-regarding

An issue has been raised whether the organisations who are engaged in design, development are maintenance of Software and enter into Annual Maintenance contracts for maintenance of their software, are exempt from Service Tax or not.

2. 'Maintenance or repair' means any service provided by (i) any person under a maintenance contract or agreement or (ii) a manufacturer or any person authorised by him in relation to maintenance or repair or servicing of any goods or equipment. In the instant case repair is not of tangible goods but that of intangible program/software which is in installed condition and thus the maintenance and repair of software is not maintenance and repair of 'goods'. Further an exemption has been granted to maintenance or repair services in relation to computer, computer systems and computer peripherals vide Notification No. 20/2003-ST dated 21.8.2003. As such computer software would form a part of computer systems would be covered under this notification. Under the category of 'consulting engineer' vide Notification No. 4/99-ST dated 28.2.99 taxable service provided to any person by a consulting engineer in relation to computer software is exempted. The definition of "Business Auxiliary Service" also specifically provides that; inter alia, maintaining of computer software is covered in the T service, which is excluded from the scope of business auxiliary service.

3. Taking the above into consideration, it is to clarify that maintenance of Software is not chargeable to Service Tax.

4. Suitable Trade Notice may be issued for the benefit of the trade.

5. The receipt of this Circular may kindly be acknowledged indicating the date of its receipts in your office.

6. Hindi version will follow.

Manish Mohan  
Under Secretary to the Government of India

6.5 Further, we have examined the agreement entered into between the appellant and Yamaha India and we find that the appellant is engaged in the business of software development which

is exempted from service tax in view of the Notification No. 04/1999-ST dated 28.02.1999 and Circular No. 70/19/2003-ST dated 17.12.2003. Here, it is relevant to reproduce the relevant clauses of the agreement entered into between the appellant and Yamaha India to ascertain the true nature and scope of services provided by the appellant to Yamaha India:-

#### Scope of Services

YM INFOTECH shall provide support, including use of recourse, time and effort of personnel, skill, and expertise to YAMAHA INDIA to enable it to manage its Information Technology facilities and to develop and provide better solutions, as may be required from time to time. YM INFOTECH shall be responsible for the following activities (collectively referred to as the "Services"):

a) Information Technology Technical and Infrastructure Services Support, including:

- Planning and managing day-to-day Information Technology needs
- First level LAN/WAN trouble shooting
- Data recovery, if required from readable backups
- System Administration for operating systems
- Network Capacity Planning based on Business Plans provided by YAMAHA INDIA
- Disk Space Management on servers
- Database Administration (DBA)
- Database Tuning
- Database Space Management
- Database recovery, if required from Pandard audit trails as available with YAMAHA INDIA
- Configuration of modem, switches, routers, hubs, etc.
- Configuration of new version of applications
- Support in procuring and managing Hardware and Software assets

- Maintenance of Hardware and Software standardization
- Assistance in formation of policy, education and support on virus control
- Manage Data Security on main Server using software products provided by YAMAHA INDIA
- Maintain and modify Data Network
- Coordination with hardware and software vendors for Annual Maintenance Contract and support services.

b) Existing application support, and implementation (including running of application as well as remaining PACKAGED SOFTWARE/CUSTOMIZED SOFTWARE Modules as per annexure (II)

- Implementation of application package for training as well as for actual use
- Install Application packages on hardware
- Study of existing systems and identifying missing functionality in standard application packages
- Give presentation of package functionality by screen presentation of all transaction and explanation of data flow
- Development of front end reports and queries
- Validation of reports and queries required by users to identify which is required to be modified/ freshly developed
- To get data from existing system
- Impart hands on training to key users
- Help users in conducting test runs
- Support Application package go-live from information Technology perspective. Support of go-live by key users Working Application Support
- Facilities to create master data where necessary
- Data migration from old system as per agreed norms
- Coordination with functional system experts for smooth sign off of application.
- Minor Customization of the remaining modules of packaged SOFTWARE/ CUSTOMIZED SOFTWARE modules and legacy systems. (Tools Management, Plant Maintenance, QA, Costing, After Sales Services)."

6.6 We also find that the nature of services as provided in the agreement are in relation to operation, development and facilitation of software and without said services, the usage of software would be redundant. Here, it is relevant to reproduce the observation of the Tribunal in the case of Nokia (India) Pvt. Ltd. cited (supra) to highlight that software engineers job is not only confined to development of software rather they helps in system development and designs, construct, test and maintain computer application software and system and solve technical problems that arise during the working of the software.

"Computer software engineers apply the principles and techniques of Computer science, engineering and mathematical analysis to the design, development, testing. and evaluation of the software and systems that enable computers to perform their many applications. Software engineers, working in applications or systems development analyze users needs and design, construct, test and maintain computer applications software or systems. They solve technical problems that arise. Software engineers analyze users' needs and design, construct, and maintain general computer applications software or specialized utility programs. Software engineers co-ordinate the construction and maintenance of a company's computer systems and plan their future growth. Working with a company, they coordinate each department's computer needs-ordering, inventory, billing, and payroll record keeping, for example and make suggestion about its technical direction. Software engineers works for companies that configure, implement and install complete computer systems. They may be members of the marketing or sales staff, serving as primary technical resource for sales workers and customers. They may also be involved in product sales and in providing their customers. With continuing technical support. Computer software engineers design new hardware, software and systems that control the computer."

6.7 We also note that the Tribunal in the case of Nokia (India) Pvt. Ltd. cited (supra) has observed that the advisory support service relating to software clearly falls within the domain of the service by a software engineer and accordingly software support services were exempted from payment of service tax under the category of consulting engineer's service.

6.8 We also find that the activities of the appellant are specifically made taxable under Section 65 (105) (zzzze) of the Finance Act, 1994 w.e.f. 16.05.2008 under the category of Information Technology Software Services and the appellant is registered under the provisions of service tax under this category and regularly discharging service tax liability and the same is not in dispute, but during the disputed period from 01.10.2002 to 12.03.2004, the activities of the appellant were not subject to service tax in view of the exemption notification as well as the Circular issued by the CBEC cited (supra).

6.9 Therefore, in view of our discussion above, we are of the considered view that during the period in dispute, the activities of the appellant were exempted by Notification No. 04/1999 dated 28.02.1999 and the Circular No. 70/19/2003-ST dated 17.12.2003. When the appellant is not liable to pay service tax, the question of demanding interest and imposing penalty does not arise. Consequently, we set-aside the impugned order by allowing the appeal of the appellant with consequential relief, if any, as per law.

*(Pronounced on 06.02.2024)*

**(S. S. GARG)**  
MEMBER (JUDICIAL)

**(P. ANJANI KUMAR)**  
MEMBER (TECHNICAL)