CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 614 of 2012

[Arising out of Order-in-Original No. CHD-CEX-001-COM-006-12 dated 08.02.2012 passed by the Commissioner of Central Excise & Service Tax, Chandigarh-I]

Commissioner of Central Excise and Service Tax, Chandigarh-I ……**Appellant**
Plot No. 19, Central Revenue Building,
Sector 17-C, Chandigarh 160017

VERSUS

Esys Information Technologies Pvt Ltd ……**Respondent**
Dlf IT Park, 2nd Floor, Tower C, Site No. 22-23,
Manimajra, Chandigarh 160101

APPEARANCE:

Shri Shivam Syal, Authorized Representative for the Appellant

Shri Ajay Kumar Jain, CA and Shri Lovish Bansal, Advocate for the Respondent

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

FINAL ORDER NO. 60474/2025

DATE OF HEARING: 17.12.2024
DATE OF DECISION: 07.04.2025

S. S. GARG :

The present appeal is filed by the Revenue against the impugned order dated 08.02.2012 passed by the Commissioner of Central Excise & Service Tax, Chandigarh-I, whereby the learned Commissioner has vacated the show cause notice issued to the respondent and dropped the proceedings initiated thereunder.

2.1 Briefly stated facts of the present case are that the respondent are registered with the service tax authorities for payment of service tax on nine services. The respondent were issued a show cause notice dated 22.04.2010; the main allegations in the show cause notice are as under:

- It was observed that an Agreement called "Microsoft OEM Distribution Channel Agreement" dated 3rd Feb, 2005 ('Agreement') was entered into between the Noticee and Microsoft Licensing, GP, USA ('Microsoft'). Under the Agreement, Microsoft had granted the Noticee the non-exclusive and limited right to order and deliver packages of Microsoft OEM System Builder Software and hardware in geographical territory assigned to the Noticee. For each package of software or individual software license that was to be delivered by the Noticee, they were to pay royalty, applicable at the time of shipment by Microsoft as mentioned in the relevant 'royalty and price list'. The Noticee were also to pay the prevalent price of hardware as mentioned in the relevant 'royalty and price list'.

- It was alleged that the royalty paid by the Noticee to the Microsoft for purchase of software was not the cost of the software as was evident from the accounts of the Noticee. The royalty represented fees paid by the Noticee to the Microsoft and had been alleged to be the consideration for "franchise service” received by the Noticee from Microsoft in terms of the Agreement.

- It was also alleged that as Microsoft permitted the Noticee to use their corporate name, technology name and demarks in plain text and logos, trade dress, designs or word marks in stylized form, therefore, the Noticee could, in relation to the products distributed by them, identify and refer to Microsoft and their technology and services. It is alleged that the Noticee, thus, received franchise service from Microsoft and had paid royalty to them in view of services received from them.

- It was observed that the Noticee had paid Rs.5,94,35,317/- to Microsoft as 'franchise fees' during the period 01.10.2008 to 31.03.2009 and the Noticee were liable to pay service tax under reverse charge mechanism in terms of Section 66A of the Finance Act, 1994 (‘the Act’) read with Rule 2(1)(d)(iv) of Service Tax Rules, 1994 (‘STR’) and read with Rule 3 of the Taxation of Services (Provided from outside India and Received in India) Rules, 2006 under the services in the category of 'Franchise Service' as defined under Section 65(47) of the Act. The franchise services provided by the Microsoft were provided from outside India and were received in India and the services provider did not have any office in India, consequently, the Noticee were liable to pay service tax.

- Thus, it was alleged that the Noticee did not intimate the facts of receiving of various services from service providers located outside India. The Noticee suppressed the fact of receiving taxable services from service providers located outside India and contravened various provisions of the Act and STR with intent to evade the payment of service tax. Consequently, the extended period of limitation as provided under proviso to Section 73 (1) of the Act has been invoked. Accordingly, the Noticee was charged with contravention of the provisions of Section 66, 66A, 68, 69 & 70 of the Act read with Rule 4, 5, 6 & 7 of the STR.

- Thus, the Noticee were called upon to explain why the service tax (including Education Cess) amounting to Rs.73,46,205/- should not be recovered from them and along with interest as provided under Section 75 of the Act. The Noticee have also called upon to explain as to why penalty under Section 76, 77 & 78 of the Act should not be imposed on them.

2.2 The respondent filed detailed reply to the show cause notice and submitted that the respondent are distributor of various IT Products manufactured by different companies in India and outside India and they entered into an agreement with Microsoft. Under the said agreement, the respondent were authorized to purchase the software packs from authorized replicators of Microsoft and subsequently sell the CD packs to customers in India. The respondent were never engaged in reproduction or replication of software of Microsoft. They were only selling the software developed by Microsoft and replicated by person authorized by Microsoft.

2.3 After considering the reply of the respondent, the learned Commissioner, vide the impugned order, dropped the proceedings initiated against the respondent. Aggrieved by the said order, the Revenue has filed the present appeal.

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

4.1 The learned Authorized Representative for the appellant-Revenue submits that the impugned order is not sustainable in law as the same has been passed without properly appreciating the definitions of 'franchise' as defined under Section 65(47), 'franchisor' as defined under Section 65(48) and 'taxable service in relation to franchise' defined under Section 65(105)(zze) of the Finance Act, 1994.

4.2 The learned Authorized Representative further submits that the agreement between the respondent and Microsoft clearly grants certain representation rights by the Franchisor i.e. Microsoft GP, USA to sell their goods.

4.3 The learned Authorized Representative further took us through the various clauses of the agreement to buttress his argument that in fact, the respondent were granted representation rights to sell their hardware and software packs identified with Microsoft and they were entitled to use certain Microsoft trade names and trademarks in plain text (but not logos, trade dress, designs or words marks in stylized form) to accurately identify and refer to Microsoft and its technology and services.

4.4 The learned Authorized Representative further submits that the learned Commissioner has wrongly held that the respondent only paid the cost of the goods ordered for delivery to other persons and if the value of the software contained in the package was described as 'royalty', it did not alter the nature of the transaction between the respondent and Microsoft.

4.5 The learned Authorized Representative also submits that the respondent were paying separately the cost of the goods i.e. of packs to the authorized replicator i.e. licensed manufacturer of the said packs and paying separately the software royalties to Microsoft to use their representational rights to sell the said packs which were being received from authorized replicators.

4.6 The learned Authorized Representative further submits that royalties paid by the respondent to Microsoft were nothing but the fees paid by the respondent for holding the representational rights of Microsoft to sell their Microsoft hardware and software packs being received by the respondent from the authorized replicators of Microsoft, USA.

5.1 On the other hand, the learned Consultant for the respondent submits that the agreement between the respondent and Microsoft clearly provides that the respondent's company can sell the products of Microsoft and other non-Microsoft companies. He further submits that there is not a single word of franchises/franchisor/franchisee used in the agreement. The price paid for the hardware is called 'purchase price' and the price paid for canned software as 'royalty' as a common general nomenclature throughout the whole world. He further submits that Microsoft has not given any representational rights to the respondent's company and therefore, only selling the goods does not *ispo facto* bring the agreement within the ambit of a franchise. He relies on the following decisions:

a) Tata Consultancy Services Ltd – 2019 (6) TMI 109 CESTAT MUMBAI
b) Global Transgene Ltd – 2013 (32) STR 86 (Tri. Mumbai)
c) ITW India Limited and Hemal Zaveri – 2023 (9) TMI 134 CESTAT AHMEDABAD
d) Tally (India) Pvt Ltd – 2024 (11) TMI 665 CESTAT BANGALORE

5.2 The learned Consultant further submits that the learned Commissioner after considering the various clauses of the agreement dropped the proceedings by holding that the respondent were only a conduit for delivery of packages from replicators and Microsoft to the persons to whom the packages were delivered.

5.3 The learned Consultant further submits that the learned Commissioner has held that the agreement between the respondent and Microsoft did not create any franchise and the respondent were not selling goods on representational basis; they were not manufacturing goods under a license from Microsoft; no service was provided by the respondent with same characteristics and quality as that of Microsoft; the respondent have been clearly described as license distributor in the agreement; from the agreement, non franchise has been established and hence no franchise fee was paid by the respondent to Microsoft.

6. We have considered the submissions made by both the parties and perused the material on record. Before going into the merit of the case, it would be pertinent to reproduce the relevant definitions of 'franchise' as defined under Section 65(47), 'franchisor' as defined under Section 65(48) and 'taxable service in relation to franchise' defined under Section 65(105)(zze) of the Finance Act, 1994, which are reproduced herein below:

> ***The term 'franchise' under 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."*
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> ***The term 'franchisor' under 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 term "franchisee" shall be construed accordingly.*
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> ***Taxable service in relation to franchise under 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. After perusal of various clauses of the agreement which clearly state that the agreement is non-exclusive between the parties and

Microsoft makes software and hardware available to the respondent on a non-exclusive basis.

8. Further, we find that the there is not a single word of franchises/franchisor/franchisee used in the agreement between the respondent and Microsoft and Microsoft has not given any representational rights to the respondent's company and the respondent have only right to sell the goods which does not fall within the ambit of a franchise. In this regard, it is pertinent to refer the decision of the Tribunal in the case of **Tata Consultancy Services Ltd** (supra) wherein it has been held as under:

> **"d.** The findings recorded by the Commissioner clearly show that he has not been able to appreciate as to what is meant by "grant of representational right". Grant of representational right would imply that the person to whom such rights have been granted under takes the entire activity as if it had been undertaken by the person granting such right. In this case the so called Sub Certifying authorities and Sub CA Administrators (Sub CAA), Registering Authorities and RA-Administration appointed by appellants have any authority to issue DSC certificates, representing them to be issued by appellant. Such transfer of right granted to appellant, by the certifying authority in terms of IT Act, 2000, is also not permissible. It is only the Appellants who could have issued the Digital Signature Certificate and this could not have been done by any other person or agency appointed by appellant. Hence mere act of collecting the applications and verification of the same for onward submission to the appellant cannot be termed as "grant of representational rights". We are supported in our view by the decision of

Hon’ble Delhi High Court in case of Delhi International Airport P Ltd [2017 (50) STR 275 (DEL)] wherein it has been laid down:

> “56. Merely because, by an agreement, a right is conferred on a party to sell or manufacture goods or provide services or undertake a process, would not ipso facto bring the agreement within the ambit of a franchise. What is also required is to establish that the right conferred is a “representational right”.
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> 57. The term “representational right” would necessarily qualify all the three possibilities i.e., (i) to sell or manufacture goods, (ii) to provide service, and (iii) undertake any process identified with the franchisor.
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> 58. A representational right would mean that a right is available with the franchisee to represent the franchisor. When the Franchisee represents the franchisor, for all practical purposes, the franchisee loses its individual identity and would be known by the identity of the franchisor. The individual identity of the franchisee is subsumed in the identity of the franchisor. In the case of a franchise, anyone dealing with the franchisee would get an impression as if he were dealing with the franchisor.”

e. Similarly in case of Global Transgene Ltd [2013 (32) STR 86 (T-Mumbai)] Tribunal has held as follows:

> “5.2 From the above, it will follow that before the amendment w.e.f. 16-5-2005 and thereafter the foremost, and key pre-requisite to qualify as taxable service is that the franchisee should have been 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. Board, vide Circular No. 5918/2003-S.T. and Circular No. B1/6/2005-TRU, has recognized this aspect.
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> 5.3 Undisputedly, the appellants have imported the Technology which is owned by BTC and patented in China. The said technology is imported in the form of the mother seeds and the same are multiplied in the laboratory by or on behalf of the appellants and given to the sub-licencee to further multiply for onward sale by them to the farmers for the purpose of growing commercial crop. The appellants are not granted any ‘representational right’ from BTC to represent them in India, nor entitled to grant or they have actually granted any representational right to the sublicensees.

> 5.4 The Revenue's case rests on the premise that the logo or hallmark belonging to the appellant is put on the seed package manufactured/marketed by the sublicensees. The appellants produced a few samples of the product package labels before us. On perusal of the samples, we agree with the appellant that the packages contain a mark "Fusion BT" which only denotes that the seeds being sold contain Fusion BT genes, and it does not denote that the said mark is either a logo or a trademark or hallmark of the appellant. The department could not show that any logo or hallmark belonging to the appellant has been put on the packages manufactured/marketed by the sub-licensees. We further find force in the contention of the appellant that a laptop containing a label of 'windows', only denotes that the processor or the operating system/software, as the case may be in the said laptop and by putting such label, the laptop manufacturing company does not represent 'Microsoft' or become the franchisee of 'Microsoft'. Admittedly, in a franchisee transaction the franchisee loses his individual identity and represent the identity of franchisor to the outside world, as in the case of 'McDonald' the customers are not concerned with who owns the 'McDonald's restaurant (franchisee). The customers identify it with 'McDonald (the franchisor)."

f. Thus we do not find any merits in order of the Commissioner confirming these demands under the category of Franchisee Services.**"**

9. We also find that similar view has been taken by the various benches of the Tribunal in the cases of **Global Transgene Ltd** (supra), **ITW India Limited and Hemal Zaveri** (supra) and **Tally India Pvt Ltd** (supra).

10. Further, we find that the respondent's company is distributor of various IT Products manufactured by different companies in India and outside India. As per the agreement with Microsoft, the respondent were authorized to take software packs from the authorized replicators of Microsoft and subsequently sell the CD packs to customers in India. The respondent were never engaged in

reproduction or replication of software of Microsoft. They were only to sell the software developed by Microsoft and replicated by person authorized by Microsoft. The respondent were procuring the OEM packs from authorized replicators based in India and outside India and sold the same in condition in which they were purchased.

11. Further, we find that in terms of the agreement, the purchase price of Microsoft OEM pack was bifurcated into two components i.e. hardware price and software price. The cost of hardware purchase was paid as per the prevailing 'royalty and price list' and was to be paid to the authorized replicators. The hardware was operated by the software developed by Microsoft; the software was provided by Microsoft under the agreement; Microsoft receives their charges for a software directly from the respondent and the said payment by the respondent to Microsoft in nomenclature is described as 'royalty payments' but actually the payments were made for purchase of software. The agreement between the respondent and Microsoft was on principal to principal basis and the said agreement was executed purely on commercial and as trading transaction and it does not grant any representational right to the respondent so as to fall under the ambit of franchise service. In fact, the relationship between the respondent and Microsoft was that of a buyer and a seller and not of a franchisee and a franchisor.

12. Further, we find that the learned Commissioner has analyzed the terms & conditions of the agreement and has rightly come to the

conclusion that the agreement between the respondent and Microsoft does not create franchise service.

13. In view of our above analysis and by following the ratios of the decisions of various benches of the Tribunal as cited above, we do not find any infirmity in the impugned order; accordingly, we uphold the same by dismissing the appeal of the Revenue.

(Order pronounced in the open court on 07.04.2025)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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