

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI**

Appeal No.ST/170/2012

[Arising out of Order-in-Original No.62/2011 dt. 25.11.2011 passed by
Commissioner of Service Tax, Chennai]

Philips Electronics India Ltd.

Appellant

Versus

Commissioner of Service Tax,
Chennai

Respondent

Appearance :

Shri Prasad Paranjape, Advocate
For the Appellant

Shri K. Veerabhadra Reddy, JC (AR)
For the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of hearing / decision : 07.08.2018

FINAL ORDER No. 42443 / 2018

Per Madhu Mohan Damodhar

The facts of the case are that appellants are engaged in manufacturing and marketing of lighting consumer life style and healthcare products. They entered into several agreements with their overseas group entity in the Netherlands under which they avail infrastructure services for which payment was made by the former. Pursuant to investigations, show cause notice

dt.18.08.2010 was issued to appellant inter alia demanding service tax liability of Rs.2,48,32,462/- on such payments made to the overseas group entity under the category of “Online Information and Database Access or Retrieval” (OIDAR) services. In adjudication, the Commissioner vide impugned order dt. 25.11.2011 confirmed the demand as proposed in the SCN with interest and also imposed equal penalty under Section 78 of the Finance Act, 1944. Aggrieved, the appellants are before this forum.

2. When the matter came up for hearing, on behalf of the appellant, Ld. Counsel Shri Prasad Paranjape reiterated the grounds of appeal and also made further submissions which can be broadly summarized as under :

i) It is evident from the statutory provisions that in order to attract service tax under OIDAR category, it is necessary that service provider provides data or information to a client through a computer network for a consideration. In other words, service contract should be such, which provides for payment of consideration by the recipient of service for receiving data or information in electronic form through a computer network.

ii) In the instant case, no data or information belongs to Philips Netherlands and it does not provide any data or information to the appellant for a consideration. What Philips Netherlands provides is the computer infrastructure by way of network connectivity and associated services for the appellant to manage its various information technology requirements such as email services or accessibility of owned data or information or communication among its various entities across the country and outside.

iii) This service can be equated with telecom service which facilitates connectivity between two points. In the case of Wide Area Network (WAN) service various offices of the appellant can communicate with each other and exchange Data or Information amongst each other.

iv) These services are more appropriately classified as telecommunication services as defined under Section 65 (109a) of the Act. It is specifically provided at serial nos. (vi) and (vii) of Section 65 (109a) of the Act that private network services including provision of wire or wireless telecommunication link between specified points and data transmission services including provision of access to wired or wireless facilities specifically designed for efficient transmission data shall be treated as a telecommunication service.

v) Appellant relies on the judgements of this Hon'ble Tribunal in the case of *United Telecom Ltd. Vs. Commr. Of Service Tax, Bangalore* – 2009 (14) STR 212 (Tri.- Bang.) where in a similar situation, service tax demand was set aside by this Hon'ble Tribunal.

vi) In view of the above submissions, he submits that the services received by them from their own overseas entity will not merit classification as OIDAR service and, therefore, the present demand deserves to be set aside.

vii) In the present case the demand is for the period from April 2006 to December 2007, whereas the impugned show cause notice was issued on 18 August 2010 which is much beyond the normal period of limitation.

3. On the other hand, Ld. A.R Shri K. Veerabhadra Reddy supports the impugned order. He drew our attention to para 6.2 of the impugned order where

the adjudicating authority has referred to clauses in the “IP Services – Service Level Agreement” ratified on 28.08.2006 by which the purpose of the PGN IP services has been clarified to provide the Philips Community with a private Wide Area IP Network dedicated to supporting Philips businesses. It is an internally open network, providing “any to any” IP communication between all Philips locations connected to the Philips Global Network; there is no specific bar in the service level agreement prohibiting the assessee from accessing the information available on the server which relates to other Philips locations. Ld. A.R also drew attention to para 6.3 of the impugned order wherein the adjudicating authority has found that the overall goal of Secure Wireless LAN (SWLAN) service is to provide an authorization infrastructure to secure the use of wireless communications within Philips and is designed to protect wireless connectivity and have wireless access to all net work resources on the LAN. It is therefore clear that charges collected is for access of the entire net work resources. Hence the service provided cannot definitely come under the category of OIDAR.

4. Heard both sides.

5.1 From the facts on record, it is seen that the following IT Infrastructure services were centrally provided by Philips Netherlands to all their locations worldwide :

- i. Managed Backbone infrastructure to enable communication by means of electronic mail for its employees;
- ii. Managed Desktop and managed server service offerings;
- iii. Maintenance of software of users’ desktops;
- iv. Email services for non-employees;

v. Services to manage personal calendar, share calendar, personal contacts, corporate directory, to do offline delegation, mail back-up and restore services;

vi. IT Infrastructure by way of Private Wide Network Services.

5.2 The department has sought to bring these IT infrastructure services within the fold of OIDAR. We find that the term “Online Information and Database Access or Retrieval” has been defined under Section 65 (75) of the Act to mean providing Data or Information Retrieval or otherwise to any person in electronic form through a computer network. Further under Section 65 (105)(zh) of the Act, taxable service means any service provided or to be provided to a client by any person in relation to Online Information and Database Access or Retrieval or both, in electronic form through computer network in any manner.

5.3 The main take away from the definitions is that services provided should facilitate not only online information but also Database Access or Retrieval. From the facts on record, it appears to reason that the infrastructure services are nothing but a spider web group which connects Philips Netherlands to all its locations worldwide through the Wide Area Network (WAN) of internet protocol. For such Philips Global Network Services, payment is made on the basis of invoices raised by Philips Netherlands towards maintenance of server / portal, license fees, server software maintenance cost, infrastructure for global platform, hiring of web space for storing data, management and maintenance of web portal, licence cost for access for wireless WAN environment, Directory services for listing etc. Some of these services which can be availed by Philips locations and employees are of the nature of “Calendaring and Scheduling Directory,

Philips e-mail, file back up etc. In any case, all these infrastructure services are only in the nature of providing intra connectivity between Philips locations worldwide and the payments made are obviously then for sharing of the maintenance cost between the Philips' units and not as fees for supply of online information or retrieval of data from the portal.

6. Viewed in this context, we find that the impugned infrastructure services cannot by any stretch of imagination be brought within the fold of "Online Information and Database Access or Retrieval". Hence the impugned order to the contrary will therefore not sustain and will require to be set aside, which we hereby do. Appeal is therefore allowed with consequential benefits, if any, as per law.

(operative part of the order pronounced in court)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

gs

