CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

Regional Bench – Court No. III

Service Tax Misc. Application No. 41380 of 2017
(on behalf of Respondent)
In
Service Tax Appeal No. 84 of 2010

(Arising out of Order-in-Original No. 59/2009 dated 22.10.2009 passed by the Commissioner of Service Tax, 692, Anna Salai, MHU Complex, Nandanam, Chennai – 600 035)

M/s. Foxteq Services India Pvt. Ltd., : Appellant
No. 28, (N.P.) Thiru-vika Industrial Estate,
Ekkaduthangal, Guindy, Chennai – 600 032

VERSUS

The Commissioner of G.S.T. & Central Excise, : Respondent
Chennai South Commissionerate,
MHU Complex, 692, Anna Salai, Nandanam,
Chennai – 600 035

WITH

(i) Service Tax Misc. [CT] Application No. 41379/2017 in Service Tax Appeal No. 381/2010 (M/s. Foxteq Services India Pvt. Ltd.);

(Arising out of Order-in-Original No. 04/2010 dated 25.03.2010 passed by the Commissioner of Central Excise, Chennai-II Commissionerate.

(ii) Service Tax Misc. [CT] Application No. 41096/2017 in Service Tax Appeal No. 612/2010 (M/s. Foxteq Services India Pvt. Ltd.);

(Arising out of Order-in-Appeal No. 145/2010 (M-ST) dated 30.07.2010 passed by the Commissioner of Central Excise (Appeals), Chennai.

(iii) Service Tax Misc. [CT] Application No. 41356 to 41358/2017 in Service Tax Appeal Nos. 648 to 650/2011 (M/s. Foxteq Services India Pvt. Ltd.);

(Arising out of Order-in-Original Nos. 47 to 49/2011 dated 29.09.2011 passed by the Commissioner of Service Tax, Chennai.

APPEARANCE:
Shri. N. Venkataraman, Senior Advocate for the Appellant
Ms. Cynduja Crishnan, Advocate for the Appellant

Shri. S. Govindarajan, Authorized Representative for the Respondent

CORAM:
HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. MADHU MOHAN DAMODHAR, MEMBER(TECHNICAL)

FINAL ORDER NOS. 40694-40699 / 2019

DATE OF HEARING: 26.03.2019

DATE OF DECISION: **29.04.2019**

PER BENCH :

All these appeals involving the same appellant and identical issues are taken up together for common disposal.

2.1 The appellants are providers of Maintenance or Repair Services. Pursuant to audit of accounts, it emerged that the appellants had entered into an agreement with M/s. Hewlett Packard India Sales Pvt. Ltd. (hereinafter referred to as 'HP') to render/provide 'part support service' to them; appellants had been supplying parts and accessories against requirement during the warranty period on the sale of HP products.

2.2.1 The Department took the view that sale of computers is inclusive of after-sales warranty also; that it is the bounden duty of HP to keep inventory of parts and accessories for free replacement on failure of their product during the warranty period; that this involves huge operation requiring space, manpower, finance, etc., and the same are outsourced to the appellants; that support service of appellant is warranted by HP to take care of the customer for their business; that part of the work relates to after-sales warranty service is entrusted to the appellant for maintaining inventory stocks and distributing them as and when required for replacement; that for this service provided by appellant to HP, they have been paid agreed amounts of USD 6.24 and USD 5.15 by HP for every sale of computer. It appeared to the Department that the aforesaid operations performed by appellants were liable to be classified under Sub-Clause (iv) of Section 65(19) of the Finance Act, 1994 under the sub-category of "procurement of goods or services" on behalf of the client under the service category of "Business Auxiliary Service".

2.2.2 A number of Show Cause Notices were accordingly issued to the appellants proposing to demand service tax under the above category with interest thereon for different periods and also proposing imposition of penalties under various provisions of law. In adjudication, the lower adjudicating authorities concerned confirmed the proposed tax demands with interest and also imposed penalties. Aggrieved, the appellants have filed Appeal Nos. ST/84/2010, ST/381/2010 and ST/648 to 650/2011 before this forum.

2.3 The brief details of the Show Cause Notices, periods involved, amounts in dispute and related Appeal numbers are given in the table below :

Sl. No	Appeal No.	SCN No. & Dt.	Order-in-Original No. & Dt.	Period of dispute	Amount involved (in Rs.)	Penalty
1.	ST/84/2010	128/2008 dt. 23.04.2008	59/2009 dt. 22.10.2009	March 2006 to January 2008	2,03,97,252/-	Under Section 76 & 78
2.	ST/381/2010	68/2009 dt. 20.03.2009	04/2010 dt. 25.03.2010	February 2008 to September 2008	50,47,451/-	Under Section 76
3.	ST/648/2011	82/2010 dt. 05.04.2010	47-49/2011 dt. 29.09.2011	October 2008 to July 2009	58,02,961/-	Under Section 76
4.	ST/649/2011	351/2010 dt. 02.06.2010		August 2009 to March 2010	37,60,630/-	Under Section 76 & 77
5.	ST/650/2011	57/2011 dt. 16.03.2011		April 2010 to September 2010	26,59,747/-	Under Section 76 & 77

2.4.1 The appellants had filed a refund claim on 05.12.2007 for Rs. 12,01,946/- seeking refund of service tax amounts paid during the period from August 2005 to February 2006 and interest paid on 20.02.2007.

2.4.2 The claim was filed by the appellants on the grounds that they had started their company in July 2005 and their operations in August 2005 and were paying service tax at the rate of 10.2% till February 2006; that in the meantime, the appellant received a Notice from the sales tax Department claiming that their business would attract sales tax and after consulting their legal experts, they paid the sales tax and stopped paying service tax; that, however, as per the directions of the Service Tax Department for short payment of service tax, they paid the same along with interest on 20.02.2007; that as their activity would not be covered under the purview of service tax, a refund claim was being filed by them.

2.4.3 However, a Show Cause Notice dated 22.09.2008 was issued to the appellant proposing denial of the refund claim, *inter alia* on the grounds that appellants have provided Business Auxiliary Services with effect from August 2005 and that service tax and Education Cess paid by them in respect of services provided to HP is in order. The Original Authority vide order dated 30.12.2008 confirmed the proposals in the Show Cause Notice and rejected the refund claim In appeal, the Commissioner (Appeals) vide Order-in-Appeal No. 145/2010 (MST) dated 30.07.2010 held that the appellant had not furnished their contract or any evidence to prove that their activity is only sale, in the absence of which he concurred with the findings of the Original Authority that the activity carried out falls under "procurement of goods or service on behalf of the client" under Business Auxiliary Service. Hence, Appeal No. ST/612/2010.

3. Today when the matter came up for hearing, on behalf of the appellants, Ld. Senior Advocate Shri. N. Venkataraman assisted by Ld. Advocate Ms. Cynduja Crishnan, made oral and written submissions which can be broadly summarized as under :

(i) The appellants had entered into a contract with HP, a renowned Multi-National Company for the sale of spares and accessories in course of rendition of warranty/after-sales service by Redington India. In other words, the commercial obligation which is two-fold is being contracted by HP with two different entities, i.e., the appellants and Redington India. HP had entered into a contract with Redington for warranty/after-sales service which involves two components viz., rendition of service and usage of parts in the course of rendition of service. The obligation on the part of the appellant is to sell the spares, components and accessories to HP and to hand over the same to Redington on the instructions of HP as per the terms of the contract.

(ii) It is the obligation of Redington India to undertake the warranty/after-sales service utilizing the components sold by the appellants to HP. Therefore, it is submitted that the only obligation on the appellant is to sell parts and accessories and when required to HP and deliver the same to Redington India for it to use in completing its service obligation with HP. While this being the case, the erroneous finding of the Commissioner/Commissioner (Appeals) under 'Business Auxiliary Services' is clearly unsustainable.

(iii) Section 65(19)(iv) would apply for a service provider who engaged in procurement of goods or services which are inputs for their clients. The role of a service provider under the said Sub-Clause is one where he would act as a facilitator in the procurement of goods or services, which, in turn, shall be used as inputs for their clients. It is such a transaction wherein a service provider acts as a facilitator to his clients and is entitled to service consideration, which is liable to service tax under Section 65(19)(iv) of the Act.

(iv) However, in the activities carried out by the appellant, there is no service obligation attached in the whole transaction. The only commercial obligation is the sale of goods by the appellant to HP as and when required. The appellant does not procure goods to HP. It rather sells goods to HP. The appellant is not a facilitator or a service provider to HP, but is a seller to HP. Hence, a pure and simple sale/purchase transaction has been misconstrued to be a service contract under Section 65(19)(iv) of the Act. The impugned Orders holding that the appellant is a service provider to HP is therefore without any legal basis.

(v) For the purpose of continuity of business, in normal commercial transactions, a contract for supply of materials regularly can be obligated and casting of such an obligation will not alter a transaction of sale into a transaction of service. The fact that the appellants are paid a fixed sum for the supply of materials in addition to the cost of the product would only indicate that the same is paid as an additional consideration to ensure uninterrupted supply.

(vi) The impugned Orders have completely ignored the fact that the appellants had paid sales tax on the goods sold to HP and supply to Redington India. The same transaction which has suffered sales tax cannot now be treated as a transaction of service. The Hon'ble Apex Court in the case of ***M/s. Imagic Creative Pvt. Ltd. Vs. Commissioner of Commercial Taxes – 2008 (9) S.T.R. 337 (S.C.)*** has categorically held that sales tax and service tax are mutually exclusive. The Hon'ble Apex Court in the case of ***M/s. Bharat Sanchar Nigam Ltd. Vs. Union of India – 2006 (2) S.T.R. 161 (S.C.)*** reversed the decision of the Hon'ble High Court of Kerala that a transaction of sale can also be a service.

(vii) The agreement of the appellant with HP is to provider part support service only i.e., supply of parts and accessories on sale of HP products. Referring to the agreement, Ld. Counsel submitted that the authorities below have been carried away by the words used in the agreement without going into the substance of the agreement itself and have thus erroneously held that the appellants have provided services to HP. The relationship between the appellants and HP is one of a seller and a buyer and not that of a service provider and a service recipient. Even though the word 'service' is used in the agreement, in effect, it was mere supply of parts and accessories to HP.

(viii) The appellants submitted documentary evidence along with the invoices raised on HP to identify the sale rendered by them and the cost and expenses incurred thereon; that this would evidence the fact that the amount is paid by HP on the basis of sale transaction.

(ix) Ld. Counsel furnished documents with regard to Annexure-C to the agreement and argued that Annexure-C refers to the type of warranty programme and payment schedule. The authorities below had relied upon the recitals in Annexure-C to the agreement to observe that HP intends to procure goods or services from the appellants for the warranty services rendered by Redington India.

(x) The Master Purchase Agreement entered into between HP and the appellant was furnished. The payment schedule was referred to by the appellant to point out that the payment is based on the quantity of spare parts supplied.

(xi) Ld. Senior Counsel submitted copies of tax invoices issued as per the Warranty Adder India for personal computer, related purchase order, etc., to establish the following contentions :

a. The master purchase agreement is for the sale of goods in the nature of computer part for warranty obligation to HP.
b. The bills of materials describe each and every part of a computer of a particular model along with a part and batch number.
c. The Annexure to the invoice very clearly refers to the model number.
d. The tax invoice refers to the program 'CARLTON' which has been duly referred to in the Annexure-C to the agreement. Consequently, there is an identification of the part, the programme under which it has to be supplied and the price to be charged of it supply.
e. The entire description including model batch quantity and price relate only to goods sold and supplied.
f. There is no reference to any service element for consideration being paid for any rendition of service.

g. Since this happens to be a sale transaction, appellants have also paid appropriate VAT. The tax invoice referred to in the note is Invoice No. FSI10-008 dated 31.08.2010 which clearly indicates the TIN number 33550862992 and the VAT rate at 4% and the tax amount charged towards the sale.

h. The copy of the sales tax return for the month of August 2010 is also appended. Annexure-II of the return refers to the details of sale/transfer during the month of August 2010. Sl. No. 3 refers to the tax invoice No. FSI10-008 dated 31.08.2010 wherein there is a clear indication of sale value as Rs. 26,80,862.17. Tax rate at 4% and the VAT amount paid is Rs. 1,07,234.49/- (totalling to Rs. 27,88,096.66/-)

i. Sum indicated in the sales tax return is in rupees and the grand total in the tax invoices refer to Rs. 27,88,096.66/- and the annexure to the tax invoices show the break up towards tax as Rs. 1,07,234.49/-.

(xii) Ld. Senior Advocate has also argued that the proceedings are barred by limitation. He has submitted the following :

a. In response to a spot memo dated 19.10.2006, the noticees replied by submitting that the obligation is only to sell parts which activity is not a service. Reliance was also placed on the decision rendered by the Hon'ble Supreme Court in the Case of *M/s. Bharat Sanchar Nigam Ltd. (supra).*

b. Vide communication dated 20.07.2007 addressed to the Assistant Commissioner of Service Tax, the noticee had placed on record the entire business arrangement in the form of flow chart to declare in unambiguous terms that the transaction involved is nothing but purchase/sale of goods.

c. In response to the communication dated 14.02.2008 retained by the Assistant Commissioner of Service Tax directing the noticees to work out the service tax involved for the period from 01.08.2005 to 31.01.2008, the noticees had resisted the liability once again vide reply :

> *" However, after all these communications, the SCN 128/2008 dated 23.04.2008 was issued demanding service tax under the heading 'Business Auxiliary Service' invoking the extended period of limitation alleging that the appellant had suppressed material facts with intention to evade payment of duty. The above communications would show that the appellant had*

> *been corresponding with the Department regularly about the nature of activities carried out by them and allegation of suppression is totally baseless and the order thus deserves to be set aside."*

4. On behalf of the Revenue, Ld. AR Shri. S. Govindarajan made a number of submissions which are summarized as under :

(i) HP is engaged in the sale of computers and computer accessories to various customers in India. HP have entered into a contract with Redington India for providing warranty/after-sales service. M/s. Foxteq Services India Pvt. Ltd. (appellant herein) are engaged in the procurement of goods and supply of the same for the above warranty/after-sales service.

(ii) The appellant entered into an agreement namely "India Service Agreement" on 01.08.2005 with HP and as per the terms of the agreement, the appellant is required to source and procure spare parts locally or through imports and on instructions, supply the same to Redington India to enable HP to meet out its obligation of service/warranty.

(iii) HP pays the appellant a fixed sum based on the sale of computers every month and not as per the spare parts supplied for the warranty/after-sales service, as per the conditions of the service agreement. It means that the appellant receives a particular amount for each computer sold by HP, irrespective of the cost of the spare parts supplied or not for the after-sales service. Further, this amount is paid by HP to the appellant in the month of the sale of computers itself.

(iv) Condition (2) of the above said agreement explicitly states that "in consideration of these services, the HP will pay the fees", a fixed sum to the assessee towards each product sold to cover the service charges, whether the actual cost of spares is more or less.

(v) Condition (4) of the agreement states that the assessee will raise invoices every month "for the services accepted by HP" and along with each invoice, the appellant shall submit documentary evidence so that HP can "identify the services rendered and the cost expenses incurred in the performance of the services".

(vi) Further, the appellants are required to test and report all defective parts, provide current product engineering support on request and furnish various reports at various intervals to HP. In ordinary sale-purchase transactions no such liabilities and conditions can be fastened on the seller.

(vii) On behalf of HP, the appellant is maintaining enough inventories and on request, supply the parts to Redington India for replacement. The obligation of HP does not end with the sale of the products, but it is their bounden duty to service/attend to the fault of the said products during the warranty period. In order to render the service, it is essential to maintain adequate inventory of spares/accessories, which requires space, manpower, money, etc., which is outsourced to the appellant.

(viii) Under Section 65(19) of the Finance Act, 1994, "Business Auxiliary Service" means any service in relation to –

> *(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or*
>
> *(ii) promotion or marketing of service provided by the client; or*
>
> *(iii) any customer care service provided on behalf of the client; or*
>
> *(iv) procurement of goods or services, which are inputs for the client; or*
>
> *[**Explanation**. — For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]*

(ix) The services of procuring the inventory and keeping them ready for supply squarely falls under Clause (iv) of Section 65(19) of the Finance Act, 1994. In terms of Clause (iv) above, the service provider is rendering assistance in procuring goods or services which are inputs for their client.

(x) Moreover, since the invoices raised by the appellant are not based on the value of the spare parts supplied but on the number of computers sold by HP, payment of VAT is incorrect. The "India Service Agreement" is based on the services provided by the appellant to HP and hence, they are liable to discharge service tax and not VAT.

(xi) Further, the appellant does not charge the exact price of the goods but charge a fixed sum. Notification No. 12/2003-ST exempts the value of goods and materials sold by the service provider from the taxable value for the purpose of levy of service tax. However, in this case, the value of goods is not determined and only a fixed sum is charged as per the agreement entered with the client.

(xii) Also in the instant case, service tax is demanded only on the value on the agreed amount received from HP for the services rendered to HP viz., maintaining inventory and stock and distributing them as and when required for replacement and hence, the decision of the Hon'ble Supreme Court in the case of M/s. BSNL (supra) with regard to inclusion of cost of SIM card in the activation charges will not apply in this case.

(xiii) The invoice is raised as a fixed amount based on the model of the computers sold. The remuneration received by the appellant has no relationship with the actual quantity of parts supplied by the appellant to Redington during the warranty period. Therefore, the consideration received is not in relation to the goods, but is relatable only to the service of procuring material and maintenance of inventory of computer parts for replacement. The Bench may be pleased to uphold the demands of service tax and dismiss the appeals and thus, render justice.

(xiv) Mere payment of VAT will not help to avoid service tax liability. Ld. AR relies upon the decision of the Tribunal in the case of ***M/s. Bata India Ltd. Vs. Commissioner of C.Ex. & S.T., Delhi – 2018 (15) G.S.T.L. 339 (Tri. – Del.).***

5. Heard both sides and have gone through the facts of the case.

6. The issue that comes up for dispute resolution is whether the activity carried out by the appellants herein will be in the nature of a service transaction which would be exigible to service tax under the Finance Act, 1994 or otherwise.

7.1 The impugned Orders have confirmed/upheld that the appellants are liable to service tax for their services of procurement of goods or services on behalf of HP under the category of 'Business Auxiliary Services' falling under Section 65(19) of the Finance Act, 1994. For better understanding, the relevant portions of the said Section is reproduced hereunder :

"[(19) "business auxiliary service" means any service in relation to, —

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

[Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]

[(v) production or processing of goods for, or on behalf of, the client;]

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, [but does not include any activity that amounts to manufacture of excisable goods]."

(Emphasis added)

7.2 The takeaway from the above definition of 'Business Auxiliary Service' is that the services so provided are intended for the purpose of enhancing the marketing or sale of goods, promoting the marketing of service, providing customer care service on behalf of the client or producing or processing goods for or on behalf of the client or any services incidental or ancillary to such activities. The impugned orders have held that the appellants provide Business Auxiliary Service under the sub-category of 'procurement of goods or services'. A closer perusal of the said Section 65(19)(iv) indicates that the service that would fit into this category would be procurement of goods or services which are inputs for the client. Hence, it appears to reason that for such a service provider, any goods that may be procured for the client should be procured for the purposes of the latter using them as inputs, obviously, in the manufacture of intermediate or final products of such client.

7.3 The Explanation to the said sub-category has clarified, that for the purposes of the said sub-clause, "inputs" means all goods or services intended for the use by the client. This Explanation is in sync with the definition of "input" in Rule 2(k) of the CENVAT Credit Rules, 2004 whereby "input" means all goods, with certain exclusions and inclusions, "used in or in relation to the manufacture of final products or for any other purpose", within the factory of production. In a broader sense, the input for the purpose of Section 65(19)(iv) ibid could also include goods intended for use even by a service provider, for example, by an Authorized Automobile Service Station, who requires approved parts and components providing their service. Thus, an entity which facilitates supply of such inputs to a client who is either a manufacturer or even a service provider, for use, either in manufacture or for provision of service, will only come under the fold of 'procurement of goods or services' which are inputs for the client under Section 65(19)(iv) ibid. An even more important requirement to fall within the fold of Section 65(19)(iv) ibid is that the ownership or title of the goods procured by the "service provider therein" will directly shift from the seller of such inputs to the client of such service provider. The title of the goods will never vest, at any point of time, with the said service provider.

8. We now proceed to apply the aforesaid improved understanding of Section 65(19) ibid to the facts of the cases on hand.

9.1 The impugned activities of the appellant have their emanation in the Master Purchase Agreement, between M/s. Hewlett Packard India Sales Private Limited (HP) and the appellant. As per paragraph 2 of the agreement, the same is based on various types of business models between HP and the Original Design Manufacturer (ODM), for example : Foxconn (Far East) Ltd., Argyle Holding Ltd., Best Behaviour Ltd., Foxteq Service India Pvt. Ltd., Foxteq Holdings Inc (Caymans), etc. (in this case, the appellant).

9.2.1 In the first business model, the ODM will be providing full system Integration Services for HP desktop OC, also selling PC sub-assembly parts (L5 and L6) to the two M/s. HP India factories and final assembly of desktop PC will be performed by HP only.

9.2.3 In the second business model, the ODM concerned will design and develop products as per HP specifications. The product design and development shall include hardware and software component design and qualification, ongoing engineering changes of parts, all submissions for safety and regulations, software image for the product hard disk drive utilizing the operating system ("Software Build") and in-country testing of the software image. The ODM will also take into account the product quality for this "India Business Agreement" and be financially accountable for any reasonable cost incurred by HP for product defects outside the terms of the Master Purchase Agreement or India Business Agreement, as mutually agreed upon.

9.2.4 In another business model, the ODM concerned will provide warranty parts and service to HP or its service partner in India to provide warranty services to HP customers in India. It appears that out of this business model, only the appellant is supplying warranty parts to Redington India, who are providing services for HP products in India.

9.3.1 As per paragraph 11.3 (b), for Warranty Support Charges, the ODM will invoice HP by the first week of every month for the service performed during the previous month unless a different schedule is expressly stated along with supporting documentation to identify the service rendered and the expenses incurred to HP by the ODM. As per paragraph 11.4 (c), HP will pay to M/s. Foxteq India (appellant herein) for Warranty Support Adder in India Rupees.

9.3.2 At first blush, from the word 'service' used with respect to Foxteq in the agreement could very well give rise to a conclusion that the activities of the appellant are in the nature of a 'service' taxable under the Finance Act, 1994. However, we find that even in the business model of sale of PC Sub-assembly parts (L5 and L6) to M/s. HP India factories for final assembly, the said activity has also been termed as "service rendered" in paragraph 11.3 (a) of the agreement. The agreement also stipulates that HP may lay down various changes or add reporting requirements to meet the needs of the business arrangement.

9.4 From the facts on record, it is definitely not the case that the appellants are facilitating procurement of inputs for enabling the assembly of desktop PCs by M/s. HP India. So also, the appellant is not providing any after-sale service for repair or maintenance of HP products. That responsibility has been given to Redington India as per the agreement between HP and Redington.

10. Revenue has argued that the appellants did not charge the exact price of the goods, but charged a fixed sum; that value of the goods are not determined by one of the parties and only a fixed sum is charged as per the agreement and therefore, the sum received by the appellants from HP is consideration for services and not for sale of goods. On perusal of the agreement, we find that it is stated that M/s. Foxteq (appellants herein) will invoice HP by the first week of every month for the services performed (and accepted by HP) during the previous month unless a different schedule is expressly stated in Exhibit-B. Thus, it is clear that the appellant is raising invoices each time only when goods are supplied to Redington on behalf of

HP. It is also mandated that if VAT is payable by HP, then such amount payable shall clearly be indicated in Foxteq's invoice to HP and further, that the appellant must not invoice HP for any other taxes. The payment by HP to appellant is also made on receipt of the invoices.

11. From the payment schedule in Exhibit-C, we find that the payment is fixed on the basis of "per piece" (PC). For example, Carlton – USD 6.24/PC, Ganesh - USD 5.15/PC, etc. It is also not disputed that the pieces are sold by appellant to HP and only supplied/delivered to Redington to facilitate repair, replacement, etc., in warranty period as per the agreement of Redington with HP. It therefore appears to reason that the average cost of parts has been taken by the same method of calculation and agreement between HP and the appellant, and the equalized cost for each type of warranty supply (Warranty Adder type) has been arrived at and is being charged accordingly by appellant to HP, as agreed upon between the two. As per the Attachment C – Payment Schedule, *inter alia*, the following has been indicated :

		Program	**US $**	
1.	Warranty Adder India 1 year	Carlton	$6.24/PC	
	Warranty Adder India 1 year	Ganesh	$ 5.15/PC	
	Warranty Adder India 1 year	Catfish	$ 4.45/PC	
	Warranty Adder India 3 years	Carlton	$10.62/PC	
	. . . .			

12.1 From the sample trail of invoices produced by the Ld. Senior Advocate for appellants, it is clear that appellants are paying VAT at the rate of 4% on the entire value indicated, which has been worked out by taking the unit price and multiplying it by the quantity supplied. For ready reference, the scans of the trail of documents submitted by the Ld. Senior Advocate are reproduced hereunder :

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Foxteq Services India Private Ltd.
No.28 (N.P) Thiru – Vi- Ka Industrial Estate,
Ekkaduthangal, Guindy,
Chennai - 600 018
TEL: 91-44-32550491
PAN No. AAACF 9033B
Service Tax# MRS\Chennai-IV\665\STC

TAX INVOICE

Invoice No.: FSI10-008
Date: 31st Aug 2010
Payment term/due date: NT40 / 10th Oct 2010
TIN No.: 33550862992
Purchase Order Ref No: SBB179651-V3

Bill to address:
HEWLETT-PACKARD INDIA SALES PRIVATE LIMITED
COMPAQ CENTRE,92 INDUSTRIAL SUBURB II STAGE
YESHWANTHPUR BANGALORE 560022 KARNATAKA
INDIA

Ship to address:
REDINGTON (INDIA) LIMITED
SERVICE LOGISTICS
GUINDY INDUSTRIAL ESTATE,
EKKADUTHANGAL CHENNAI 600 032
GUINDY , CHENNAI 600 097
INDIA

Please remit to:
Account Foxteq Services India Privat Limited .
Bank Name: STANDARD CHARTERED BANKCHENNAI BRANCH
Account No.: 427050 99853
Switch Code: SCBLINBBXXX
Bank Address: 19 RAJAJI SALAI CHENNAI INDIA

Item	Cust PN/Foxteq PN	Description	Cust PO.	QTY	Curr	UnitPrice	Amount
1		Warranty Adder for Carlton 1 Year – Aug'10	SBB179651-V3	469	USD	6.24	2926.56
2		Warranty Adder for Carlton 3Year – Aug'10	SBB179651-V3	164	USD	10.62	1741.68
3		Warranty Adder for Catfish 1 Year – Aug'10	SBB179651-V3	6344	USD	4.45	28230.80
4		Warranty Adder for Catfish 3 Year – Aug'10	SBB179651-V3	1865	USD	9.46	17642.90
5		Warranty Adder for Yangtze 1Year – Aug'10	SBB179651-V3	452	USD	9.63	4352.76
6		Warranty Adder for Whitney 3Year – Aug'10	SBB179651-V3	59	USD	46.75	2758.25
Total							57652.95

VAT Tax Rate: 4%
Tax Amount: 2306.12
Grand total: 59959.07
Exchange Rate: 46.5
Grand Total in INR: 2788096.66

For FOXTEQ SERVICES INDIA PVT LTD
Authorised Signatory

Remark:

DISCLAIMERS: Payment-Payment for total amount listed hereon should be made in accordance with the payment term and conditions shown bove Any amounts not so paid shall bear interest at the rate often percent (10%) per annum or the maximum rate permitted by law.Legal fees-Provided that legal action is commenced to collect amount due to HonHai for the products listed hereon, the prevailing party in such action shall be entitled, in addition to any otherrelief, to be reimbursed by the other party for the prevailing. Limited to reasonable attorney's fee (including the allocated cost of such revailingparty's in-house counsel) and expert witness fees.

	Model	Part#	Description	Qty	Project	warranty	Month	Month1	Date	Year	USD $	Total	Exchang rate	Total Bill Amot	UPM	Prod
i	S5260IN	AU797AA	HP Pavilion Slimline s5260in PC	5	CARLTON	3	Aug-10	8	1	2010	$10.62	$53.10	46.5	2,469	ARCHES3	TOW
2	P6343IN	BK399AA	HP Pavilion p6343in PC	52	CARLTON	3	Aug-10	8	1	2010	$10.62	$552.24	46.5	25,679	CARLTON3	TOW
3	P6511IN	BW429AA	HP Pavilion p6511in PC INDIA	449	CARLTON	1	Aug-10	8	1	2010	$6.24	$2,801.76	46.5	130,282	CARLTON1	TOW
4	P6530IN	BN716AA	HP Pavilion p6530in pc INDIA	44	CARLTON	3	Aug-10	8	1	2010	$10.62	$467.28	46.5	21,729	CARLTON3	TOW
5	P6570IN	BN718AA	HP Pavilion p6570in pc INDIA	30	CARLTON	3	Aug-10	8	1	2010	$10.62	$318.60	46.5	14,815	CARLTON3	TOW
6	P6378IN	BK421AA	HP Pavilion p6378in PC	33	CARLTON	3	Aug-10	8	1	2010	$10.62	$350.46	46.5	16,296	CARLTON3	TOW
7	P6338IN	BK419AA	HP Pavilion p6338in PC	20	CARLTON	1	Aug-10	8	1	2010	$6.24	$124.80	46.5	5,803	CARLTON1	TOWE
8	CQ3258IN	BK422AA	Compaq Presario CQ3258IN PC INDIA	116	CATFISH	1	Aug-10	8	1	2010	$4.45	$516.20	46.5	24,003	CATFISH1	TOWE
9	CQ3370IX	BN726AA	Compaq Presario CQ3370IX PC INDIA	589	CATFISH	3	Aug-10	8	1	2010	$9.46	$5,571.94	46.5	259,095	CATFISH3	TOWE
	CQ3340IX	BN877AA	Compaq Presario CQ3340IX PC INDIA	985	CATFISH	3	Aug-10	8	1	2010	$9.46	$9,318.10	46.5	433,292	CATFISH1	TOWE
	CQ3350IX	BR789AA	Compaq Presario CQ3350IX PC INDIA	1,479	CATFISH	1	Aug-10	8	1	2010	$4.45	$6,581.55	46.5	306,042	CATFISH1	TOWE
	CQ3380IX	BN727AA	Compaq Presario CQ3380IX PC INDIA	191	CATFISH	3	Aug-10	8	1	2010	$9.46	$1,806.86	46.5	84,019	CATFISH3	TOWE
	CQ3310IX	BN723AA	Compaq Presario CQ3310IX PC INDIA	70	CATFISH	1	Aug-10	8	1	2010	$4.45	$311.50	46.5	14,485	CATFISH1	TOWE
	CQ3320IX	BN724AA	Compaq Presario CQ3320IX PC INDIA	2,107	CATFISH	1	Aug-10	8	1	2010	$4.45	$9,376.15	46.5	435,991	CATFISH1	TOWE
	CQ3330IX	BN725AA	Compaq Presario CQ3330IX PC INDIA	902	CATFISH	1	Aug-10	8	1	2010	$4.45	$4,013.90	46.5	186,646	CATFISH1	TOWE
	CQ3217IN	BK260AA	Compaq Presario CQ3217IN PC INDIA	120	CATFISH	1	Aug-10	8	1	2010	$4.45	$534.00	46.5	24,831	CATFISH1	TOWE
	CQ3277IN	AY653AA	Compaq Presario CQ3277IN PC	58	CATFISH	1	Aug-10	8	1	2010	$4.45	$258.10	46.5	12,002	CATFISH1	TOWE
	CQ3219IX	BK441AA	Compaq Presario CQ3219IX PC	100	CATFISH	3	Aug-10	8	1	2010	$9.46	$946.00	46.5	43,989	CATFISH3	TOWE
	CQ3311IX	BW434AA	Compaq Presario CQ3311IX PC INDIA	1,477	CATFISH	1	Aug-10	8	1	2010	$4.45	$6,572.65	46.5	305,628	CATFISH1	TOWE
	CQ3247IN	AY651AA	Compaq Presario CQ3247IN PC	15	CATFISH	1	Aug-10	8	1	2010	$4.45	$66.75	46.5	3,104	CATFISH1	TOWE
	600-1160IN	AY665AA	HP TouchSmart 600-1160in PC	44	WHITNEY	3	Aug-10	8	1	2010	$46.75	$2,057.00	46.5	95,651	M53	AIO
	300-1140IN	AY664AA	HP TouchSmart 300-1140in PC	15	WHITNEY	3	Aug-10	8	1	2010	$46.75	$701.25	46.5	32,608	WHITNEY3	AIO
	CQ1-1020IX	BK339AA	CompaqPresario CQ1-1020IXAll-in INDIA	449	YANGTZE	1	Aug-10	8	1	2010	$9.63	$4,323.87	46.5	201,060	YANGTZE1	AIO
	CQ1-1030IN	BK340AA	CompaqPresario CQ1-1030inAll-in-One PC	3	YANGTZE	1	Aug-10	8	1	2010	$9.63	$28.89	46.5	1,343	YANGTZE1	AIO

$57,652.95	Total Amout	2,680,862.18
$2,306.12	4% Tax	107,234.49
$59,959.07	Grand Total	2,788,096.66

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tAnnI http://www.tnvat.gov.in/forms/FormI/NewprintAnnII.aspx?val=xMdj

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Government of TamilNadu

Commercial Taxes Department

Details of Sales/Transfer value during the month 08-2010

ANNEXURE II

SLNO	NameofBuyer	BuyerTIN	CommCode	InvoiceNO	InvoiceDate	SalesValue	TaxRate	VAT Category
1	REDINGTON INDIA LTD	335536220701	2068	Legacy-011	31/07/2010	700	0.04	28
2	REDINGTON INDIA LTD	335536220701	2068	Legacy-012	31/08/2010	4100	0.04	164
3	HEWLETT PACKARD INDIA SALES P LTD	07100219540	2068	FSI10-008	31/08/2010	2680862.17	0.04	107234.49
4	HEWLETT PACKARD INDIA SALES P LTD	07100219540	2068	4300417376	31/08/2010	90040	0.04	3601.6
5	HEWLETT PACKARD INDIA SALES P LTD	07100219540	2068	4300414318	17/08/2010	750590	0.04	30023.6
						3526292.17		141051.69

12.2 In Tax Invoice No. FSI10-008 dated 31.08.2010, a number of Warranty Adders for different quantities have been indicated. In Serial Number 1, the Warranty Adder for Carlton 1 year is indicated at USD 6.24; 496 units have been billed at USD 2926.56. So also, in Serial Number 2, the Warranty Adder for Carlton 3 Year has been indicated at USD 10.62; 164 units have been billed at USD 1741.68. The relevant portion is extracted hereunder :

Item	Cust PN/ Foxteq PN	Description	Cust PO.	QTY	Curr	Unit Price	Amount
1		Warranty Adder for Carlton 1 Year – Aug'10	SBB179651 – V3	469	USD	6.24	2926.56
2		Warranty Adder for Carlton 3 Year – Aug'10	SBB179651 – V3	164	USD	10.62	1741.68
3		Warranty Adder for	SBB179651 – V3	6344	USD	4.45	28230.80

		Catfish 1 Year – Aug'10				
4		Warranty Adder for Catfish 3 Year – Aug'10	SBB179651 – V3	1865	USD	9.46	17642.90
5		Warranty Adder for Yangtze 1 Year – Aug'10	SBB179651 – V3	452	USD	9.63	4352.76
6		Warranty Adder for Whitney 3 Year – Aug'10	SBB179651 – V3	59	USD	46.75	2758.25
	Total						57652.95

12.2 For the total of the unit prices shown as USD 57652.95, the VAT tax rate at 4% has been indicated and the VAT has been calculated at USD 2306.12; total billing with the VAT comes to USD 59959.07, which when converted to INR comes to Rs. 27,88,096.66 The related purchase order given by Foxteq (appellants herein) is seen as PO No. SBB179651-V3 issued on 24.03.2010. As per the copy of the related VAT returns also submitted along with these invoices (page 52), for Invoice No. FSI10-008 dated 31.08.2010 for sales value of Rs. 2680862.18, VAT at 4% amounting to Rs. 107234.49 has been shown to be paid.

12.3 From the above example, we are sufficiently satisfied that 'units' and not 'services' are billed by the appellants to HP; that the total invoice value comprises of the number of units in which the Warranty Adder payment is agreed upon in advance. Further, on the total of such amounts, VAT at the rate of 4% is also billed and added in the invoice. Ld. Senior Advocate has also demonstrated that VAT is paid in respect of all these invoices. In the circumstances, as already discussed earlier, notwithstanding the usage of the term 'services' in the India Service Agreement entered into on 01.08.2005 between the appellant and HP as also the usage of the same word at a number of places, the fact remains that even from the same agreement it is evident that the purported services relate only to supply of warranty parts. This conclusion is further supported by Exhibit-A to the very same agreement where in the 'Statement of Work' the following is noted :

"1. Statement of Work – Support (Mainstream and Legacy)

1.1 ODM to provide warranty parts support, RMA management, troubleshooting and hardware repair training before each NPI launch for HP Affiliates. These will include support for all the legacy units under warranty.

1.2 ODM to establish initial seed stock quantity for warranty parts, on a quarterly basis or when new products are launched. Foxteq India is responsible to keep initial stock (and maintain parts stock level) to ensure HP or its affiliates can meet the 3 business days Turn Around Time for repairs, 95% of time, nation wide in India for end customers. HP or its Affiliates will send a request for delivery of RMA warranty parts on a weekly basis or as advised by Foxteq India.

1.3 Request for emergency parts, ODM must acknowledge the request within one Working day. For the legacy units planned buy will be performed by Foxteq India for emergency parts. All these purchases would be reimbursed by HP on a monthly basis."

13. It is then evident that HP have entered into a contract with the appellants to supply warranty parts, apparently at 'equalized' per part rate termed as "Warranty Adder" cost. However, the appellants, instead of directly supplying the parts to HP, do so to Redington India who are the authorized service organization for the impugned HP products. No doubt, the said warranty parts may well be stocked by the appellant for supply to Redington as and when warranty requirements arise. However, there cannot be any allegation that the appellant 'procures' such warranty parts on behalf of HP or, for that matter, Redington. On the other hand, the said warranty parts are imported by the appellants themselves in their own name and the title to those goods will therefore remain with them till the goods are sold to HP under invoices and supplied to Redington. It is also not in dispute that the appellants are discharging VAT liability on the entire Warranty Adder Value for each unit invoiced by them to HP. We find that the Ld. Senior Advocate has correctly placed reliance on the ratio laid down by the Hon'ble Apex Court in the case of *M/s. Imagic Creative Pvt. Ltd. Vs. Commissioner of Commercial Taxes – 2008 (9) S.T.R. 337 (S.C.).* The Hon'ble Apex Court in the case of *M/s. Bharat Sanchar Nigam Ltd. Vs. Union of India – 2006 (2) S.T.R. 161 (S.C.)* relied upon by the Ld. Advocate in paragraph 85 has *inter alia* held that the "aspect theory would not apply to enable the value of the services to be included in the sale of goods or the price of goods in the value of the service".

14. In the circumstances, the decision of the adjudicating authorities holding that the impugned activities of the appellant would fall within the mischief of Section 65(19)(iv) of the Finance Act, 1994 and that they would be required to discharge service tax liability under that category on the value of the amounts received thereon, cannot be sustained and will require to be set aside, which we hereby do.

15. The appeals (Appeal Nos. ST/84/2010, ST/381/2010 and ST/648 to 650/2011) therefore succeed on merits.

16.1 Ld. Senior Advocate for the appellant also made submissions on the ground of limitation, which have been reproduced in paragraph 3 (xii) of this order. We find merit in these arguments. However, we find that the argument of limitation can only be applied for the period from March 2006 to January 2008, which, in the instant case, has been belatedly sought to be covered by the Show Cause Notice No. 128/2008 dated 23.04.2008. For the reasons given by the Ld. Senior Advocate, much of the period covered by the Show Cause Notice dated 23.04.2008 is beyond the normal period of limitation from the date of issue of the Notice viz., 23.04.2008. So also, in Show Cause Notice No. 82/2010 dated 05.04.2010 seeking to cover the period from October 2008 to July 2009, part of the period is again outside the normal period of limitation for the same reasons.

17.1 Appeal No. ST/612/2010 relates to the rejection of refund claim of Rs. 12,01,946/-. As discussed hereinabove, the related Show Cause Notice dated 22.09.2008 was issued to the appellant proposing denial of the refund on the ground that the assessee had provided 'Business Auxiliary Service'; therefore, the amount paid by them is very much in order. The Commissioner (Appeals) vide impugned Order dated 30.07.2010 held that in the absence of any contract or evidence to prove that the activity is only sale, he concurs with the findings of the Original Authority that the activity carried out falls under "procurement of goods or service on behalf of the client" under Business Auxiliary Services.

17.2 Since we have already held hereinabove that the impugned activities of the appellant cannot be covered under Section 65(19)(iv) of the Finance Act, 1994, the impugned Order upholding the rejection of refund on such grounds cannot therefore be sustained and will require to be set aside, which we hereby do. So ordered.

18. In the result :

(i) Appeal Nos. ST/84/2010, ST/381/2010, ST/648/2011, ST/649/2011 and ST/650/2011 are therefore allowed *in toto* with consequential benefits, if any, as per law.

(ii) ST/612/2010 is also allowed with consequential benefits, if any, as per law.

(iii) The Miscellaneous Applications filed by the Department for change of cause title are allowed.

(Order pronounced in the open court on **29.04.2019**)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

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