

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, CHENNAI**

Service Tax Appeal No.212 of 2012

(Arising out of Order-in-Original No. 1/2012 dated 23.1.2012 passed by the Commissioner of Central Excise, Chennai – II Commissionerate)

M/s. Fox Conn India (P) Ltd.

Nokia Telecom SEZ, SIPCOT Industrial Park
Chennai Bangalore Highway
Sriperumbudur – 602 105.

Appellant

Vs.

Commissioner of GST & Central Excise

Chennai Outer Commissionerate
No. 2054-I, Newry Towers
II Avenue, Anna Nagar
Chennai – 600 040.

Respondent

APPEARANCE:

Shri M.N. Bharathi, Advocate for the Appellant
Shri Vikas Jhajharia, AC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Hon'ble Shri P. Anjani Kumar, Member (Technical)

Date of Hearing : 24.09.2021

Date of Pronouncement: 29.09.2021

Final Order No. **42346 / 2021**

Per Ms. Sulekha Beevi C.S.

The appellants are engaged in the manufacture of parts of mobile phones, IP Phones etc. They are registered with the Service Tax Department. During the course of audit, it was noticed that the appellants were manufacturing and clearing certain specific models of cellular phones to M/s. Sony Ericsson Mobile Communications (I) Pvt. Ltd. To make these mobiles phones functional, certain software was provided by the holding-company who had developed the software and obtained the patent right for the software. The appellant paid the license fee to M/s. Sony Ericsson, Sweden on monthly basis for using

the said software. Intellectual Property Service was brought into service tax net with effect from 10.9.2004. From the invoices issued by M/s. Sony Ericsson, Sweden, it was observed by the department that the amount collected by them towards license fee was for using the software provided by them which would fall under IPR services. Since M/s. Sony Ericsson, Sweden does not have any office in India, the appellant has to discharge the service tax liability under reverse charge mechanism. The appellants did not pay service tax on IPR services.

2. It was further noticed that M/s. Fox Conn, China had provided Management Consultancy Service to the appellant. Chinese engineers were provided by M/s. Fox Conn, China to the appellant company from time to time as per the arrangement termed as "EXPART". There was no written agreement between the appellant and M/s. Fox Conn, China for rendering advice in the field of management, know-how, skills etc. The appellant had paid DA amount to the foreign engineers / professional to cover their incidental expenses. The payment of such amount would fall under Management Consultancy Service which was brought into the service tax net with effect from 16.10.1998. The appellants are liable to discharge service tax under reverse charge mechanism under Management Consultancy Services for the period April 2006 to March 2009 which they did not pay.

3. Show Cause Notice dated 8.4.2010 was issued proposing to demand service tax under the above two categories. After due process of law, the original authority confirmed the demand, interest and imposed penalty. Aggrieved by such order, the appellant is now before the Tribunal.

4. On behalf of the appellant, Id. Counsel Shri M.N. Bharathi appeared and argued the matter. The details of the period and the amount is shown in the Table below:-

Issue	Period of dispute	Value (Rs.)
Payment made in foreign currency (license fees) to M/s. Sony Ericsson	April 2007 to March 2008	1,97,50,836/-
Payments made to foreign professionals and incidental expenses	April 2006 to March 2009	94,53,955/-
		2,92,04,791/-

5. With regard to the first issue, as to demand under Intellectual Property Service, Id. Counsel submitted as under:-

(a) Intellectual Property Right means *"any right to intangible property, namely trademarks, designs, patents or any other similar intangible property, under any law for the time being in force, but does not include copy right"*.

(b) From the above definition, it can be seen that only Intellectual Property / intangible property in the nature of trademark, design or patent would come under the purview of Intellectual Property Right Service. In the present case, the appellant has entered into agreement with M/s. Sony Ericsson, Sweden for using the software provided by them. The right to use software is not covered under the definition of Intellectual Property Service. On the other hand, the said activity is covered under the definition of 'Information Technology Software Services' which came into force with effect from 16.5.2008. As per the definition of Information Technology Software Service, 'any representation or instructions, data, sound or image, including source code and object code recorded in a machine readable form and capable of being manipulated or providing interactivity to a user, by means of

a computer or an automatic data processing machine or any other device or equipment' would fall within Information Technology Software Service. In the instant case, Information Technology Software Service has been provided by M/s. Sony Ericsson, Sweden by conferring the right to use such information technology software supplied by them electronically. In para 3 of the agreement entered into between the parties, it is clearly indicated that what has been granted to the appellant is a license for using the software for which license fee is fixed. Subsequent to such agreement, there has been electronic transmission of such software. Though the purpose for which the license had been granted is for use in manufacture, marketing, selling and distributing the products, in terms of the conditions of the agreement, the subsequent usage of the software has no bearing on the taxability of the service since services can be said to be completed on mere transmission of the software and downloading the same at the appellant's end. This event of downloading of software was completed in 2007, which was much before the period when Information Technology Software Service was brought into the taxable ambit. He also drew attention to the definition of Information Technology Software Service to fortify his contentions:-

"Information Technology Software Service"

(iv) Providing the right to use information technology software for commercial exploitation including the right to reproduce, distribute and sell information technology software and the right to use software components for the creation of an inclusion in other information technology software products. For specific exemption to packaged or canned software, refer para 57.9a.

(vi) providing the right to use information technology software supplied electronically."

He relied upon the case in *Fluent India Pvt. Ltd. Vs. CCE, Pune* reported in 2016 (42) STR 340 (Tri. Mum.)

(c) The learned counsel adverted attention to the period involved under this category and relied upon the decision in the case of Indian National Shipowners' Association Vs. Union of India reported in 2009 (14) STR 289 (Bom.) to submit that the services were not taxable under reverse charge mechanism before the introduction of section 66A in the Finance Act, 1994. The second submission made by the learned counsel is that even if the supply of software is taken as an activity falling under Intellectual Property Service, since such software is not registered in India, the same cannot be subject to levy of service tax under Intellectual Property Right Service. He relied upon the decision in the case of Technova Imaging Systems Pvt. Ltd. Vs. Commissioner of Central Excise, Chennai reported in 2019 (31) GSTL 472 (Tri. Mum.).

(d) The second issue is with regard to payment of service tax under Management Consultancy Service. Though the department alleges that M/s. Fox Conn, China provided management consultancy service, there is no evidence to show that the appellant has entered into an agreement with M/s. Fox Conn, China for receiving such service or that the appellant has paid any remuneration to any such expert personnel sent from the foreign company. In para 3.3, the department alleges that the appellant has paid an amount of Rs.7,74,42,719/- to the foreign professionals, for the period from April 2006 to March 2009. It has not proved that the same were paid to foreign professions. These amounts were paid towards rental, boarding, transportation etc. of the foreign professional who had visited India. The expenditure incurred towards their boarding, transport etc. has been construed by department as consideration paid by the appellant towards Management Consultancy Service. It is asserted by the learned

counsel, that appellant has not paid any management consultancy fees. He adverted to various invoices and explained that the appellant has only paid charges in Indian rupees for the boarding, transport and other expenses incurred by the foreign persons while they visited India.

(e) The learned counsel also argued on the ground of limitation. He adverted to para 33 of the appeal paper book and submitted that audit was conducted in 2007. A letter was issued by department to the appellant alleging that Chinese professionals have imparted training and skills to the employees of the appellant factory for which appellant has made payments and therefore liable to pay service tax under Management Consultancy Service. To this letter of the department dated 24.5.2007, the appellant had replied on 28.5.2007 explaining that they have not paid any remuneration under Management Consultancy Service. In spite of this reply dated 28.5.2007, Show Cause Notice has been issued only on 8.4.2010 alleging suppression of facts thereby invoking extending period.

(f) Moreover, the issue is entirely revenue neutral as the appellant is liable to pay service tax under these two categories by reverse charge mechanism only. The appellant would be eligible for CENVAT credit and the situation is therefore entirely revenue neutral. He prayed that the appeal may be allowed.

6. The learned AR Shri Vikas Jhajharia appeared for the department. He adverted to para 12 of the impugned order. He stressed that the right to use software is a right to intangible property and therefore it falls under Intellectual Property Service. As per the agreement entered into between the appellant and M/s. Sony Ericsson, Sweden, the foreign company has exclusive right and title and interest on the software including Intellectual Property Right on the said

software. The appellant is using the software for manufacture of their products. The license fee paid by the appellant for the right to use the software and it is not a purchase of a software. The demand raised under this category is legal and proper. On the second issue, with regard to Management Consultancy Service, learned AR referred to para 16 of the impugned order. The management or business consultant refers to any person who is engaged in providing any service, either directly or indirectly in connection with the management of any organization or business. It is not in dispute that the professional (Experts) were sent by M/s. Fox Conn, China to M/s. Fox Conn, India. This is necessarily to impart skills to the Indian employees. Though the appellant claims that no amount was paid to M/s. Fox Conn, China, yet huge expenses have been incurred to persons from M/s Fox Conn, China. These expenses are nothing but additional consideration for such services. He prayed that the appeal may be dismissed.

7. Heard both sides.

8. The two issues that arise for consideration is (i) whether the demand of service tax under Intellectual Property Service is legal and proper and (ii) whether the demand of service tax under Management Consultancy Service is legal and proper.

9. The definition of Intellectual Property has been noticed as above. It is not in dispute that the license fee is paid for the right to use the software. Such activity has been brought within the service tax net under the category of Information Technology Software Service with effect from 16.5.2008. The definition of Intellectual Property Service as under section 65(53a) is a very broad definition. The said definition as per clause (iv) reads as under:-

(iv) Providing the right to use information technology software for commercial exploitation including the right to reproduce, distribute and sell information technology software and the right to use software components for the creation of an inclusion in other information technology software products. For specific exemption to packaged or canned software, refer para 57.9a.

(vi) Providing the right to use information technology software supplied electronically.”

10. From the above definition, it is quite clear that the activity of appellant falls within Information Technology Software Service. The appellant has produced the copy of the software license agreement wherein para 3 reads as under:-

“GRANT OF RIGHT TO USE SOFTWARE

SEAB grants to FOIN the nonexclusive right to use SEAB’s Software for the purpose of having manufacture, marketing, selling and distributing products to SEIN subject to the terms and conditions of this Agreement.

FOIN shall not assign, sublicense, make available or otherwise transfer or disclose any right to use, develop, reverse engineer, decompile or otherwise use the Software without the express written consent of SEAB.

SEAB shall be responsible for supply of upgrades of the Software as and when available.

SEAB represents that the software supplied by it would meet the acceptance criteria and that it is fit for the purpose for which FOIN is acquiring it.”

11. It is evident that the agreement is for right to use software and the activity will not fall under the definition of Intellectual Property Right Services.

12. It is also to be noted that software fees have to be treated as an IPR as registered outside India. Only intangible property which is registered within India would fall under IPR service during the relevant period. The software admittedly is registered outside India. We hold that the demand under Intellectual Property Right Service cannot sustain and requires to be set aside, which we hereby do.

13. The second issue is with regard to the demand under Management Consultancy Service. Admittedly, there is no agreement furnished by the department to establish that the appellant has received management consultancy service from M/s. Fox Conn, China. On perusal of the invoices, it is seen that the amounts are in the nature of vehicle hire charges, cost of fuel charges, hostel charges, selling expenses, meal expenses, salary to staff attending the foreign personnel etc. There is no evidence for payment of remuneration to the foreign personnel in foreign currency by the appellant. Even though the appellant might have expended huge amounts for the said foreign personnel, unless there is evidence that these amounts are paid to foreign personnel for providing management consultancy service, the demand is incorrect. The demand is raised under reverse charge mechanism as seen in para 3.3 of the Show Cause Notice. It is stated that appellant is liable to pay service tax with effect from 18.4.2006 in terms of Rule 2(1)(d)(iv) of the Service Tax Rules, 1994. There is no evidence of payment in foreign currency to the foreign personnel. The invoices on which the demand of management consultancy service is raised shows merely expenses incurred by the appellant in Indian currency in the nature of hotel, transport and other expenses. There is no evidence to prove that they have received management consultancy service or paid fees for such services so as to be liable to pay service tax under reverse charge mechanism. On this ground, we hold that the demand under Management Consultancy Service cannot sustain.

14. The learned counsel has argued on the ground of limitation also. It is submitted by him that a letter dated 24.5.2007 was issued by department alleging that the Chinese professional have helped the appellant company in imparting training and other skills to their

employees and that the said activity would fall within Management Consultancy Service for which appellant is liable to pay service tax. On 28.5.2007, appellant has given detailed reply to this. In spite of this, the Show Cause Notice has been issued with much delay in 2010. On perusal of the letter issued by department, it is seen that after verification of accounts certain objections have been raised inter alia demanding service tax under the above categories. There is no positive act of suppression of facts or willful mis-statement brought out by the department so as to invoke the extended period. Further, the appellant is called upon to pay the service tax under reverse charge mechanism for the above two services. The appellant would be able to avail credit of the same and the situation is entirely revenue neutral. For these reasons, we hold that the demand is time-barred. The appellant succeeds on limitation also.

15. From the discussions made above, the impugned order is set aside and the appeal is allowed with consequential relief, if any.

(Pronounced in open court on 29.09.2021)

(SULEKHA BEEVI C.S.)
Member (Judicial)

(P. ANJANI KUMAR)
Member (Technical)