

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA**

**Appeal Nos.1)ST/64/2008 & 2)ST/75/2008,3)ST/76/2008,
4)ST/77/2008 & 5)ST/78/2008**

(Arising out of

1)Order-in-Original No.02/Commr/Adj/CE/SLG/2008 dated 13.02.2008

2) Order-in-Original No.04/Commr/Adj/CE/SLG/2008 dated 26.02.2008

3) Order-in-Original No.05/Commr/Adj/CE/SLG/2008 dated 26.02.2008

4) Order-in-Original No.03/Commr/Adj/CE/SLG/2008 dated 14.02.2008

All passed by the passed by the Commissioner of Central Excise & Service Tax, Siliguri)

Commissioner of Central Excise, Customs & Service Tax, Siliguri

M/s. Permanent IP Systems

M/s. Perfect Technologies

...APPELLANT(S)

VERSUS

M/s. Permanent IP Systems

Commissioner of Central Excise, Customs & Service Tax, Siliguri

...RESPONDENT (S)

APPEARANCE

Shri A.K.Raha, Advocate and Shri Aditya Das, Advocate for the Appellant

Shri Sudipta Ghosh, Advocate on behalf of Special Counsel for Revenue.

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER

Hon'ble SHRI V.Padmanabhan, Member (Technical)

Date of Hearing/Decision : 28.11.2018

ORDER NO.FO/A/76989-76993/2018

Per Bench :

The Appeal Nos. ST/64/2008 and ST/75/2008 are cross appeals against Order-in-Original No.02/Commr/Adj/CE/SLG/2008 dated 13.02.2008 in respect of M/s. Permanent IP Systems, Appeal No.ST/76/2008 is for subsequent period and Appeal No.ST/77/2008 and ST/78/2008 are against Order-in-Original No.05/Commr/Adj/CE/SLG/2008 dated 26.02.2008 and

Order-in-Original No.03/Commr/Adj/CE/SLG/2008 dated 14.02.2008 in respect of M/s. Perfect Technologies.

2. All the appeals deal with identical issues for different periods and as such are taken up for a decision through this common order.

3. M/s. Permanent IP System, Sikkim as well as M/s. Perfect Technologies, Sikkim were engaged in the manufacture of Public Address System falling under Chapter 85 of the Central Excise Tariff Act, 1985. For use in the manufacture of the above goods, these assesseees, as per agreement with M/s Marctec Int'l Co. Ltd., Taiwan, were downloading software on a flash Rom individually thorough a computer network. The software in ROM was being loaded on to the Public Address System and subsequently cleared on payment of Central Excise Duty. The department was of the view that the activity of downloading the software through computer network is liable to payment of service tax under the category of "Online Information and Data Base Access and Retrieval Services" defined under Section 65(105)(zh) of the Finance Act, 1994. Show Cause Notices were issued against both the assesseees covering different periods from January, 2005 to January, 2007. The Adjudicating Authority ordered payment of service tax under the above category alongwith interest under Section 75 of the Finance Act, 1994. He also ordered payment of penalty in all Order-in-Originals. These orders demanding service tax are under challenge in the present appeals by the assessee. Revenue has also filed an appeal against one of the impugned orders.

4. In this connection we heard Shri A.K.Raha, Advocate and Shri Aditya Das, Advocate for the Appellant and Shri Sudipta Ghosh, Advocate on behalf of Special Counsel for the Revenue.

5. Ld. Advocate submitted that the demand for service tax made in the impugned orders is totally unjustified for the following reasons:

i) The demand for service tax has been made on reverse charge basis in respect of the softwares which were downloaded from the foreign service provider. It is a settled position of law that there can be no levy of service tax on reverse charge basis when service is provided from service provider situated abroad for the period prior to introduction of Section 66A of the Finance Act, 1994, w.e.f. 18.04.2006.

ii) Ld. Advocate submitted that in respect of Appeal Nos.ST/75/2008, ST/76/2008 as well as ST/77/2008, the entire demands are pertaining to the period prior to 18.04.2006 and hence, the demand for service tax cannot survive. In this connection he relied on the decision of the Indian National Shipowners Association vs. Union of India [2009(13) STR 235(Bom.)] which has been upheld by the Hon'ble Supreme Court as reported in UOI vs. Indian National Shipowners Association [2010(17) STR 157(S.C.)]. He also brought to notice that these facts were circulated by the CBEC through their Circular dated 26.09.2011, in which it has been made clear that levy of service tax on taxable services provided by a non-resident or a person located outside India to a recipient in India would arise only w.e.f. 18.04.2006.

iii) Ld. Advocate further submitted that in respect of Appeal No.ST/78/2008, wherein demand made also covers the period from 18.04.2006 to January, 2007 the service tax demand is not sustainable. In this connection he advanced the argument that the softwares which were downloaded by the assesseees from Taiwan, was not a service, but a commodity which was imported through internet and for which the purchase price was paid in foreign exchange. He emphasized that

software has been held by the Hon'ble Supreme Court to be "goods" in the case of TCS vs. State of Andhra Pradesh [2004(178) ELT 22(SC)]

iv) In any case he submitted that the show cause notice issued is also hit by the limitation in as much as the assesseees have submitted copies of the agreements with the Taiwan Service Provider to the Departmental Officers.

6. On behalf of the Revenue the impugned orders have been justified.

7. Heard both sides and perused the appeal records.

8. We find that the demand for service tax has been made in respect of the software which has been downloaded by the assesseees from foreign service provider. The view of the Revenue in the impugned orders is that this activity amounts to service under the definition in Section 65(105)(zzh). However, since the service provider is situated abroad, the demand has been fastened on the assesseees on reverse charge basis. In this connection the Hon'ble Supreme Court has categorically held in the case of Indian National Shipowners Association vs. Union of India (supra) that the liability for service tax from foreign service providers will arise only after Section 66A is incorporated into the statute w.e.f. 18.04.2006. This view also been admitted by the Revenue. Under the circumstances the demand for service tax is to be set aside for the period upto 17.04.2006.

9. The period from 18.04.2006 to January, 2007 is in dispute only in respect of the Appeal No.ST/78/2008. Even for this period, the levy of service tax has been strongly resisted. It has been argued that the downloading of software is not in the nature of service, but is in the nature of purchase of software which is to be considered as goods in the light of the Hon'ble Supreme Court's decision in the case of TCS (supra). But we note that the decision of the Hon'ble Supreme Court in the case of TCS is in respect of

entirely different facts. The question before the Hon'ble Supreme Court was whether such software will be liable for payment of Sales Tax. As such we are of the view that the decision has no application in the facts of the present case.

10. It is not in dispute that the software has been downloaded from the internet from foreign based service providers. We are of the view that such activity will be covered within the definition of "Online Information and Data Base Access and Retrieval Services". As such for the period from 18.04.2006 to January, 2007, i.e. for the period after the introduction of Section 66A, we are of the view that the liability for service tax arises on the assesseees. But we note that such software is burnt into the goods which are being manufactured by the assesseees i.e. Public Address System. Such activity at the time of clearance from the factory will be liable for payment of Excise Duty. As such we are of the view that if service tax is paid on reverse charge basis, the same will be available to the appellant who is a manufacture of the Public Address System as cenvat credit in the form of input services. Hence, we are of the view that this leads to a revenue neutral situation and even if liability of service tax arises, the same will not be payable as has been held in the case of Anglo French Textiles [2018(360) ELT 1016 (Tri-Chennai)] which is also affirmed by Hon'ble Supreme Court in 2018(360) ELTA 301.

11. In view of the above discussions we are of the view that even for the period from 18.04.2006, the liability for payment of service tax against the appellant does not arise. Consequently, there is no scope for imposition of penalty also. In the result, the appeals filed by the assesseees are allowed and the impugned orders are set aside.

12. Revenue has also filed an appeal against the impugned order dated 13.02.2008 from which we are unable to discern any specific ground which merits reconsideration of the order. Since the order itself is being set aside, we reject the Revenue's appeal.

13. All the appeals are disposed of in the above terms.

(Dictated and Pronounced in the Open Court on)

S/d.

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

S/d.

(V.Padmanabhan)
MEMBER (TECHNICAL)