IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: ST/87622/2013
CROSS-OBJECTION NO: ST/CO-91141/2013

[Arising out of Order-in-Original No: 29/ST/HB/12-13 dated 21st February 2013 of Commissioner of Service Tax (Adjudication), Mumbai.]

Commissioner of Service Tax
Mumbai – II …***Appellant***

versus

BASF India Limited ***…Respondent***

Appearance:

Shri Dilip Shinde, Assistant Commissioner (AR) for appellant

Shri Gajendra Jain, Advocate for respondent

CORAM:

Hon'ble Shri M V Ravindran, Member (Judicial)
Hon'ble Shri C J Mathew, Member (Technical)

Date of hearing: 22/12/2017
Date of decision: 22/12/2017

ORDER NO: A/92299 / 2017

Per: C J Mathew

Revenue is in appeal against order-in-original no. 29/ST/HB/ 12-13 dated 21st February 2013 of Commissioner of Service Tax (Adjudication), Mumbai which has dropped proceedings initiated against M/s BASF India Limited for recovery of service tax of

₹1,40,53,000.00 payable during 2005-06 to 2007-08 and other detriment consequences. The demand pertains to payment to various clients abroad and described as 'communication and system expenses' which was sought to be classified as 'online information data base access and/or retrieval service' taxable under section 65(105)(zh) of Finance Act, 1994. The show cause notice alleged that

> *'5. On verification of the ledger accounts of the above said payments as submitted by them vide their letters dated 24.09.2010 and 04.10.2010 it appears that they paid the above said amounts as software maintenance charges and data communication charges to their group companies stationed abroad. They appear to have paid the said charges to enable them to access various software and other data located in the servers installed abroad in connection with their business. Therefore the services received appear to fall under the category of "online information and database access or retrieval service" as defined under Section 65(105)(zh) of the Act, '94 and liable to pay service tax. They have registered themselves for the said services and paid taxes due, as per their calculations, on such services received including. for the period 2005-06 to.2006-07 vide TR-6 challans 2006-07/4 and 2006-07/3, both dated 22.05.2007 and the ST-3 returns were filed on 23.10.2007. They have also confirmed the same vide their letter dated 28.05.2010.'*

And, relying upon rule 2(1)(d)(iv) of Service Tax Rules, 1994 and section 66A for the period after 18th April 2006, sought to fasten liability on the respondent.

2. While the appeal relies on the disregard of various contentions of the show cause notice by the adjudicating authority who, instead,

found fault with the contents for lack of clarity and for failing to evidence the allegations. Drawing attention to the contents of impugned order, Learned Authorised Representative asserts that there is no finding at all on the specific allegation.

3. It would appear that agreements were entered into between the respondent and various companies outside the country and, ostensibly with the objective of defraying expense borne on common data server and software among the companies in the group and it is the contention of Learned Counsel for respondent that no consideration has been received for rendering any service and, even if it were, it would not conform to the definition of 'online information and database access and/or retrieval service'.

4. Having heard the rival submissions it would appear that the Tribunal in *State Bank of India v. Commissioner of Service Tax [2014-TIOL-2097-CESTAT-MUM]* held that for taxation as provider of 'online information data base access and/or retrieval service' refers to data that does not belong to the recipient of service. The said decision examined the issue thus

> *'8. First of all, we observe that revenue has not been able to controvert certain facts stated by the appellants. These facts are that the service provider is located abroad, that the service recipient i.e. foreign offices were located abroad, the services were rendered outside India and payments were made by the foreign office located outside India to the service*

providers also located outside India. In this situation, it is not understood how the Revenue is alleging that the service provided amounts to service received in India from outside India. The appellants have made a positive statement to the effect that the foreign offices are connected to the data centre abroad through VPN and it is not possible for the domestic offices to have any access to FO network. In the absence of contradiction by the revenue on these facts, we cannot but agree with the appellant that the said service is not covered under Section 66A read with Rule 3(iii) of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006.

9. If we examine the case vis-à-vis the coverage of Section 65(105)(zh), here again the department is on a weak footing. The very description under the contract between SBI and Equant shows that Equant IP VPN is a managed network service that provides secure IP internet working which enables connectivity. The IP VPN network does not allow customers routers in different VPNs to connect with one another. Therefore, it is clear that the said VPN does not provide connectivity between SBI domestic office and the SBI foreign office. Further, on going through the definition in Section 65(75) it is seen that the same describes the service to be "providing data or information retrieval or otherwise to a customer." In the present case, it has nowhere been disputed by revenue that the data centre is located abroad to which the foreign offices have access for data and its retrieval. The ownership of data is quite clearly with the SBI foreign offices. Equant have not provided any data for access/retrieval. They have simply enabled the connectivity. They have provided connectivity which enables the FOs to access/retrieve data online. The responsibility of Equant is to ensure that network VPN functions properly. The Commissioner has totally *misread the meaning of "Service provided in relation to online information and database access or retrieval". The words "in relation" qualify "information and database access or retrieval". Clearly the service provided has to relate to information access/retrieval. And Equant has not provided information and database. The ownership of data is with the FOs. This is a vital fact. The Commissioner's finding that it is not necessary that the original data should emerge or originate from the provider of VPN network is an incorrect reading of Sections 65(75) and 65(105)(zh). It would be pertinent to refer to another taxable service on the telecommunication service under Section 65(109)(a) brought into effect on 1-7-2007 which means "service of any description provided by means of a transmission, emission or reception of signs, signals, writing, images and sounds or intelligence or information of any nature, by wire, radio, optical, visual or other electro-magnetic means or systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception by a person who has been granted the licence under the first proviso to sub-section (1) of Section 4 of the Indian Telegraph Act, 1885 and includes — data transmission services including provision of access to wired or wireless facilities and services specifically designed for efficient transmission of data." The service provided by Equant will more aptly fall under telecommunication service if provider is licensed under Indian Telegraph Act. Reliance is placed on the case of United Telecom Ltd. (supra). However, the provider of telecommunication service would be Equant but this is not the subject matter of the present dispute.*

10. For the reasons enumerated in paragraphs above, we hold that SBI India have not received "Online information and database access or retrieval" service from foreign

> *service providers. Therefore, demand of Service Tax, interest, fees and penalty is not sustainable.'*

to hold that mere access to server does not bring the activity within the purview of 'online information data base access and/or retrieval service'. Furthermore, the clarification offered by respondent that the group companies merely contribute to cost of operating and maintaining the common server appear to complement the decision of the Tribunal *supra,* the use of the server for handling of their own data.

5. Accordingly, in the absence of any acceptable evidence that the assessee had access to data of others on the common server for which consideration was made over on which they are liable to tax under section 66A of Finance Act, 1994, the charging of tax on the respondent would not be correct in law. For the above reasons we find no reason to interfere with the impugned order.

6. Appeal of Revenue is consequently dismissed. CO disposed off.

(Pronounced in Court)

(M V Ravindran)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as*