# CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

## REGIONAL BENCH

## SERVICE TAX APPEAL NO: 85026of 2013

[Arising out of Order-in-Original No. 84-86/NG/COMMR/Th-II/2012 dated 28/09/2012 passed by the Commissioner of Central Excise, Thane – II.]

Genovate Solutions (India) Pvt. Ltd. ...***Appellant***
Phoenix House, 'A' Wing, 2nd Floor, Senapati Bapat Marg, Lower Parel (West), Mumbai – 400 013

*versus*

Commissioner of Central Excise ***...Respondent***
Thane – II, 4th Floor, Navprabhat Chambers, Ranade Road, Dadar (West), Mumbai – 400 028

*APPEARANCE:*

Shri Gajendra Jain, Advocate for appellant

Shri M K Sarangi,Joint Commissioner (AR) for respondent

**CORAM:**

**HON'BLE DR. D. M. MISRA, MEMBER (JUDICIAL)**
**HON'BLE MR.C J MATHEW, MEMBER (TECHNICAL)**

## FINAL ORDER NO: A/88346 / 2018

DATE OF HEARING: 24/10/2018
DATE OF DECISION: 24/10/2018

*PER: DR. D.M. MISRA*

This is an appeal filed against Order-in-Original No. 84-86/NG/COMMR/Th-II/2012 dated 28/09/2012 passed by the Commissioner of Central Excise, Thane – II.

2. Briefly stated, the facts of the case are that the appellant are registered with the department for providing service under the taxable category of 'Commercial Training or Coaching Service' w.e.f. 25/03/2005. On the basis of investigation carried out by the service tax department it is alleged that the appellant had, though provided services under the taxable category of 'Commercial Training or Coaching Services' from July 2003 to July 2007, but failed to discharge service tax of Rs.4,54,28,547/- on the amount received for imparting the training to graduates and professional students on use of ERP software modules designed by M/s SAP India Pvt Ltd; also even though the appellant had received services from overseas service providers in relation to 'Management Consultancy Services' and 'Intellectual Property Rights Services', during the relevant period but failed to discharge service tax of Rs. 50,67,901/- & Rs.20,01,291/- respectively, under Section 66A of the Finance Act, 1994; also, it is alleged that they have failed to discharge service tax of Rs.1,99,748/- on Repair and maintenance services during the said period; also it is alleged that they had availed inadmissible CENVAT credit of Rs.1,91,57,435/- and utilized the same in discharging their service tax liability. Consequently, show cause notice was issued to them on 01.10.2008 for recovery/appropriation of the service tax amount with interest and penalty. Two show cause Notices dt.05.1.2010 & 17.1.2011 were subsequently issued for recovery/appropriation of service tax amount of Rs.1,43,05,818/- & Rs.1,16,74,102/ on

'Commercial Training or Coaching Services' and recovery of inadmissible CENVAT Credit of Rs.89,64,279/- & Rs.74,07,147/- for the period from Aug.2007 to March 2008 and April 2008 to Mar. 2009, respectively with interest and penalty as the Appellant had failed to file the ST-3 Returns and discharge the service tax due to the Govt. On adjudication the demands were confirmed with interest and penalty. Hence, the present appeal.

3. Learned Advocate Shri Gajendra Jain for the appellant has submitted that the appellant, during the relevant period from July 2003 to Mar.2009,had provided SAP-ERP training services to the candidates and professional. They discharged/paid the service tax on the said services for the period 10.9.2004 to Mar. 2009 with interest and on merit does not dispute the same, but challenge imposition of penalty. However for the period from July 2003 to 10.9.2004 since the said service being exempted by virtue of notification No. 9/2003-ST dated 20th June 2003 and notification No. 1/2004-ST dated 4.2.2004,which was in force till 30.6.2004, no service tax was paid. Further, elaborating his argument, he has submitted that the exemption was available to institutes which train unskilled and partially qualified people for having basic knowledge of computer operation so that they could get employment and since the appellants are rendering services of enhancing/upgrading skill of the qualified professionals for providing SAP/ERP training service hence exemption should be allowed to the appellant being a computer

training institute.. Any other interpretation would defeat the spirit of the said notification. He has submitted that alternatively the training imparted by the appellant helps the trainee in seeking employment from multinational companies or corporates or even could be self-employed as consultant. Thus, the appellant's services are covered under the category of 'vocational training' also. The Learned Advocate has further submitted assuming that the services provided by the appellant are taxable, then while computing the demand, cum-tax benefit ought to have been allowed to the appellant. It is his contention that section 67(2) of the Finance Act, 1994 itself provides that where the gross amount charged by a service provider is inclusive of service tax payable, the value of taxable service shall be such amount as with the addition of tax payable, is equal to the gross amount charged. In support he has referred to the judgment of this Tribunal in the case of *Commissioner of Central Excise & Customs v. Advantage Media Consultant* [2008 (10) STR 449 (T)].

4. Further, he has submitted, the Learned Commissioner erred in disallowing the CENVAT credit availed on the service tax paid on the input services for the services received at various branches on the ground that no centralized registration had been obtained for their Mumbai office. It is their contention that payments of all expenses were disbursed from their Mumbai office and they do not have separate bank accounts maintained

branch wise. Billing for taxable services provided as well as accounting of the same are maintained at their Mumbai office only. The service tax liability of all branches are discharged from Mumbai office. Hence, merely because they did not have centralized registration during the relevant period but obtained subsequently on 10.4.2012, itself cannot be a ground for disallowing CENVAT credit availed on various input service utilized in providing taxable output service. In support, the Learned Advocate refer to the judgment of the Hon'ble Gujarat High Court in the case of *Commissioner of Central Excise v. Dashion Ltd* [2016 (41) STR 884 (Guj.)].

5. Further, assailing the findings of the Learned Commissioner in confirming the demand relating to services received from overseas suppliers i.e. Intellectual Property Right Service and Management Consultancy Services, Learned Advocate was categorical in his submission that no amount has been paid by the appellant to the overseas service provider and, therefore, demand of service tax under Section 66A of Finance Act, 1994 is unsustainable. Further, he has submitted that the Learned Commissioner has erroneously confirmed the demand relying upon the report of the respective Commissionerate of Service Tax, a copy of which was not handed over to them. Regarding confirmation of demand relating to Management, Maintenance or Repair Service, Learned Advocate has submitted that during the period under dispute they provided the software

'Infopack' to their clients. He has submitted that in the definition of 'Management, Maintenance of Repair Service' an explanation was added in 01/06/2007, by virtue of which 'computer software service' was brought under the scope of the said taxable service. Therefore, 'maintenance of software' is chargeable to service tax only from 01/06/2007. Secondly, the appellant are liable to pay service tax for the period thereafter not earlier i.e. for the period 2005-06 to 2006-07. In support the Learned Advocate refer to the judgment in the case of *Oracle Financial Services Software Ltd v. Commissioner of Service Tax* [2015 (40) STR 316 (T) and *Kasturi & Sons Ltd* [2011 922) STR 129 (Mad.)]. Further, he has submitted that the maintenance of software service rendered by them is in the nature of 'Information Technology Service' and is liable to service tax only from 16/05/2008. In support, he has referred to the decision of the Tribunal in *SAP India Pvt Ltd v. Commissioner of Central Excise* [2010-TIOL-1569-CESTAT-BANG]. Further, they have submitted that since the appellant had not received the service charge amounts towards maintenance of software,hence subsequently they have written off a portion of outstanding dues which the Learned Commissioner has failed to appreciate even though specifically argued by the appellant.

6. On the issue of limitation, the Learned Advocate has submitted that the appellant *bonafidely* believe that they were not liable to discharge service tax and obtained service tax

registration only on 25/03/2005 and discharged service tax liability for the period 10th September 2004 onwards on 12.7.2005. The appellant has collected the service tax from the service recipient only w.e.f. September 2004 and paid the same to the Government. Therefore, invoking the extended period of limitation alleging willful suppression is untenable in law. The Appellant have paid the service tax belatedly and filed service tax returns belatedly. Therefor, there cannot be suppression of facts to evade payment of service tax. Further, he has submitted that since the issue involves interpretation ofrelevant provisions of the Statute , therefore, extended period also cannot be invoked.

7. Learned Authorised Representative for the Revenue reiterated the findings of the Learned Commissioner.

8. Heard both the sides and perused the records.

9. Undisputedly, the appellant has rendered services under the category of 'Commercial Training or Coaching services during the period from July 2003 to March 2009. They have taken registration for the said service on 25.3.2005 and thereafter discharged service tax with interest on the said service from 10.9.2004 to March 2009. The learned advocate for the appellant does not dispute the liability of service tax for the period from 10.9.2004 to March 2009. It is their contention that for the period July 2003 to 10.9.2004 , the training on SAP/ERP

module provided to graduates and professionals had been exempted under Notification No. 9/2003-ST dated 20th June 2003 and Notification No. 01/2004-ST dated 28.2.2004 as was in force till 30.6.2004. The ground on which they seek exemption is that the software training provided by the appellant is covered under the scope of computer training institute or vocational training institute as the case may be.

10. It is the contention of the Revenue on the other hand is that the appellant imparted training to graduates and professionals by teaching use of ERP software modules designed by M/s SAP India Pvt Ltd which are used by corporate clients to streamline their business process. The software is not necessary for running the computer nor related to imparting knowledge in computer and the course taught by the appellant on the understanding of SAP help the professionals, graduates to acquire special knowledge and skill in the working of the said software which help them to use it. Thus, the exemption is not available to the appellant since neither the appellant's institute can be designated as a computer institute rendering services imparting the knowledge in computer nor the courses offered by them are recognized by law prevailing in India. Also they would not qualify for exemption being an establishment authorized to issue a certificate recognized by law. The said reasoning has been adapted by the Learned Commissioner in the impugned order which, we find, is sustainable in law. Needless to

emphasise, the said notification allows exemption to those Institute, which provides training on computer software/hardware designed to operate the computer so that unskilled persons could acquire basic knowledge of computer operation. Therefore, the exemption is not available to the appellant for the period in dispute, that is, from 01/07/2003 to 10/09/2004. The appellant has discharged duty accepting the liability from 10/09/2004 to March 2009 with interest.

11. Regarding the issue of liability of service tax on the amount paid for receiving 'Management Consultancy Service', and 'Intellectual Property Rights Services' from the overseas buyer under reverse charge mechanism, the Learned Commissioner dropped the demand for the period up to 18/04/2006 i.e. the date of insertion of Section 66A of the Act and confirmed the demand for the period thereafter, on the basis of a verification report received from service tax Commissionerate. Disputing the said demand the appellant has submitted that even though the disputed amount has been reflected in the balance it but since the same were subsequently reversed being not paid hence no service tax liability could be fastened on them. Further, it is their contention that the demand on these services have been confirmed by the learned Commissioner on the basis of a report received from the service tax Commissionerate, however, copy of the same was not passed on them. Therefore, both the issues requires

reconsideration by the Commissioner after passing on copy of the report collected from the service tax Commissionerate to the appellant.

12. As far as the service tax liability on 'Management, Maintenance or Repair Service' relating to software provided to their clients is concerned, it is their plea that they have not received the amount in full towards sale and maintenance of the software and the appellant subsequently have written-off a portion of dues in the books of accounts. Besides, it is their argument that levy of service tax on 'Repair and Maintenance of Computer Software' came into existences w.e.f 1st June 2007, hence, for the period prior to the said date service tax is not applicable. We agree with contention of the Appellant this aspect has not been examined by the adjudicating authority while confirming the demand on the said service. Therefore, to ascertain the liability post 01st June 2007 the matter is remanded to the adjudicating authority.

13. On the issue of admissibility of the CENVAT credit amounting to ₹ 3,54,91,292/- is concerned, we find that the same was denied to the appellant on the ground that the input service invoices were issued in the addresses of the appellant which was not registered with the department nor the appellant during the relevant period possessed centralized Registration as required under the Relevant Rules. We find that this issue is no more *res integra* and covered by the judgment of the Hon'ble

Gujarat High Court in the case of *Commissioner of Central Excise v. Dashion Ltd* [2016 (41) STR 884 (Guj.)]. We note their Lordships observed as

> "7. The second objection of the Revenue as noted was with respect of non-registration of the unit as input service distributor. It is true that the Government had framed Rules of 2005 for registration of input service distributors, who would have to make application to the jurisdictional Superintendent of Central Excise in terms of Rule 3 thereof. Sub-rule (2) of Rule 3 further required any provider of taxable service whose aggregate value of taxable service exceeds certain limit to make an application for registration within the time prescribed. However, there is nothing in the said Rules of 2005 or in the Rules of 2004 which would automatically and without any additional reasons disentitle an input service distributor from availing Cenvat credit unless and until such registration was applied and granted. It was in this background that the Tribunal viewed the requirement as curable. Particularly when it was found that full records were maintained and the irregularity, if at all, was procedural and when it was further found that the records were available for the Revenue to verify the correctness, the Tribunal, in our opinion, rightly did not disentitle the assessee from the entire Cenvat credit availed for payment of duty. Question No. 1 therefore shall have to be answered in favour of the respondent and against the assessee."

14. There is no dispute of the facts that the accounts of all branches are maintained at their head office; and service tax is also paid from the head office. In other words, centralized accounting system has been operated from the Head Office at Mumbai where credit has been availed and utilized in discharging service tax liability from the Head Office. In these circumstances, following the ratio laid down Dashion Ltd.'s case, merely because the Mumbai office has not obtained centralized registration under the Relevant Rules, CENVAT credit

availed on the service tax paid on input services which are undisputedly utilized by the appellant in providing the taxable output services cannot be disallowed.

15. The appellant has pleaded that since the issue relates to interpretation of law, penalty under any of the provisions of the Finance Act 1994 cannot be imposed on the appellant. Revenue, rebutting the said argument has submitted that even though the appellant rendered the taxable services under the category of commercial Training or coaching services during the period July 2003 to September 2004 but took registration only in March 2005. Also, the periodical service tax returns were filed in 2007-08. Besides, repeated request of the Revenue for furnishing data has not been complied with leading to issuance of summons and recording statement of penalty. It is not in dispute that the appellant took registration in the year 2005 and paid the service tax in installments thereafter for the past period and for the subsequent period with applicable interest . Also, from the records it is clear that they have not furnished necessary information to the department from time-to-time particularly the fact of availing exemption and not discharging service tax for the period 01$^{st}$ July 2003 to 10$^{th}$ September 2004. However, considering that the appellant had paid the entire amount of service tax with interest and does not dispute the liability for the period 10$^{th}$ September 2004 to March 2009, we are of the view that penalty under Section 76 for the said period

on the liability relating to 'Commercial Coaching or Training Service' is justifiable. But, for the earlier period i.e. 01st July 2003 to 10th September 2004 since the appellant neither intimated the department about the rendering of service and availing exemption involving suppression the fact, accordingly, the demand is sustainable invoking extended period of limitation and penalty is imposable under Section 78 of the Finance Act, 1994.

16. We summarise our findings as below:

- Demand for the period 01/07/2003 to 09/09/2004 relating to 'Commercial Training or Coaching Service' rendered by the appellant is upheld with interest and penalty under Section 78 of the Finance Act, 1994.
- The demands relating to 'Management Consultancy Services', 'Intellectual Property Rights Service' and 'Management, Maintenance or Repair Service' are set aside and the same are remanded to the adjudicating authority to reconsider the liability after taking into consideration various submissions advanced by the appellant.
- CENVAT credit disallowed during the period is hereby set aside.
- Penalty for late filing of the returns under Section 77 and penalty under Sec.76 of Finance Act,1994 for

late service tax payments on 'Commercial Training or Coaching Service' made during the period 10.9.2004 to 31.3.2009 are upheld.

17. The impugned Order is modified accordingly and the Appeal is partly allowed/ disposed off as above.

(Order Pronounced in open court)

**(Dr. D.M. Misra)**
***Member (Judicial)***

**(C J Mathew)**
***Member (Technical)***

**/as03040504*