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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH : MUMBAI
3RD, 4TH, & 5TH FLOOR, JAI CENTRE, 34 P. D'MELLO ROAD,
POONA STREET, MASJID BUNDER (E), MUMBAI- 400 009.

From : The Assistant Registrar, CESTAT, MUMBAI. Dated: **11/04/2019**

File No.:-**ST/85272/2014**

In the matter of :-

LEAR AUTOMOTIVE INDIA PVT LTD
GROUND AND FIRST FLOOR - STP UNIT
PLOT NO-E25 E26 E27 MIDC OPP
PHILIPS INDIA LIMITED BHOSARI
PUNE Pin Code - 411 026 **(Appellant)**

Vs

COMMISSIONER OF SERVICE TAX
MUMBAI-II
4TH FLOOR NEW CENTRAL EXCISE
BUILDING MAHARSHI KARVE ROAD
CHURCHGATEMUMBAI Pin Code - 400
020 **(Respondent)**

I am directed to transmit herewith a certified copy of Order No. : A/88338/2018 dated : 08/10/2018 passed by the Tribunal under section **01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.**

(Manas Kumar Sinha),
Assistant Registrar,
Service Tax Appeal Branch
CESTAT - MUMBAI

Copy To :-
1. Commissioner Customs & Central Excise (Appeal) :**Nill**
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11.MS Knowledge Processing Pvt. Ltd.
12.TAXONGO Pvt. Ltd.
13.Advocate/(s) / Consultant/(s) / Representative:-

V. Sridharan,
401-404, Kakad Chambers, 132, Dr. Annie
Besant Road, Worli, Mumbai - 400 018

DB-D Prepared By :-

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

APPEAL NO: ST/85272/2014

[Arising out of Order-in-Original No. 56/ST-II/RS/2013 dated 25/09/2013 passed by the Commissioner of Service Tax – II, Mumbai.]

Lear Automotive India Pvt. Ltd. ... ***Appellant***

versus

Commissioner of Service Tax – II
Mumbai ***...Respondent***

Appearance:

Shri Vinay Jain, Advocate for appellant

Shri Dilip Shinde, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Dr. D. M. Misra, Member (Judicial)
Hon'ble Shri C. J. Mathew, Member (Technical)

Date of hearing: **08/10/2018**
Date of decision: **08/10/2018**

ORDER NO: A/88338/2018

Per: Dr. D.M. Misra

This is an appeal filed against Order-in-Original No. 56/ST-II/RS/2013 dated 25/09/2013 passed by the Commissioner of Service

Tax – II, Mumbai.

2. Briefly stated, the facts of the case are that during the relevant period i.e., from 2004-05 to 2008-09, the appellant procured and utilized the design software of M/s Lear Corporation, USA through an online computer network and paid a total amount of Rs.4,71,88,892/- in foreign currency. Alleging that that the services rendered by M/s Lear Corporation, USA to the appellant being in the nature of 'support software maintenance', therefore, the amount paid by appellant to M/s Lear Corporation, USA on the maintenance charges of software are liable to be taxed under reverse charge mechanism in accordance with Sec.66A of FA,1994 read with Rule 2(1)(d)(iv) of Service Tax Rules, 1994, demand notice was issued 0n 16.10.2009 for recovery of service tax amounting to Rs.57,84,940/- with interest and penalty. On adjudication, the demand was confirmed with interest and penalty. Hence, the present appeal.

3. Learned Advocate Shri Vinay Jain for the appellant has submitted that, by an agreement known as 'software usage agreement' between the appellant and M/s Lear Corporation, USA, the appellant were allowed usage of the software procured by M/s Lear Corporation, USA and the charges paid by the appellant for usage of software was equivalent to the annual maintenance charges which M/s Lear Corporation, USA pays to various vendors of the software

depending on the usage by the appellant. It is his contention that M/s Lear Corporation, USA has entered into an agreement with the vendors of software which provided them software licence. These vendors provided the software right to use basis to M/s Lear Corporation, USA and M/s Lear Corporation, USA has paid licence fees to these vendors. M/s Lear Corporation, USA, in turn recover the software usage charges paid to the overseas software vendors from their subsidiaries or associated companies including the appellant based on the number of software licence used by them. It is his contention that none of these software vendors had sent their personnel to India to provide the software services to the appellant. The software support was provided through internet. The appellant are paying service tax on the said services w.e.f. 16th May 2008 under the category of 'Information Technology Software Service' on the payments made to M/s Lear Corporation, USA for software licences received by them. Assailing the impugned order the Learned Advocate has further submitted the appellants had obtained various specialized designing software, namely, CAD software, CATIA V5, UG, etc. from Lear Corporation, USA. For use of the said software liecence fee for such usage of the software are payable on annual basis. Merely because the nomenclature in the consideration as software maintenance charges cannot alter the factual scenario. It is the substance of the transaction that is relevant rather than the

nomenclature given to the transaction. The responsibility to maintain the software is of M/s Lear Corporation, USA or the foreign vendors. Referring to the definition of 'software maintenance' defined by the IEEE Standard For Software Maintenance (1993) issued by the Institute of Electrical and Electronics Engineers Inc., he has submitted that it involves correcting faults in the software to improve performance or other attributes of the existing software to add new functions and features on continuous basis so that the software can be used by more people for more areas of business, etc. so as to adapt the software as per the requirements of the customers. It is his contention that these services are clearly in the nature of development of software and are specifically covered under the category of Information Technology Software Service which has become taxable w.e.f. 16/05/2008 and the same services is not covered under any taxable entry prior to the said date. In support, he has referred to the decision of the Tribunal in the case of *SAP India Pvt Ltd v. Commissioner of Central Excise* 2011 (21) STR 303 (Tri.-Bang.)].

4. Further he has submitted that the Learned Commissioner has erroneously held that there is no documentary evidence to prove that the appellant had acquired the right to usage of software and also in terms of the invoice, it is clear that the appellant paid charges towards software maintenance only. He has submitted that necessary evidence had been provided to the department and the copy of invoice and the

agreements in terms of which it is clear that the appellant had received the right to use the software. Learned Commissioner mis-directed himself by the nomenclature used in the invoices without appreciating the terms contained in the software lease use agreements.

5. Further, they have submitted that maintenance and repair of computer software prior to 01st June 2007 under the category of 'maintenance and repair service' since not provided, hence not taxable. They have submitted that a specific *Explanation* was inserted in the definition of 'maintenance and repair service' as defined under Section 65(64) of Finance Act, 1994 so as to include 'software' as 'goods'. The said *Explanation* would be applicable only prospectively and not retrospectively. In support they refer to the decision of this Tribunal in the case of *Phoenix IT Solutions Ltd v. Commissioner of Central Excise* 2011 (22) STR 400 (Tri.-Bang), *Kasturi & Sons Ltd v. Union of India* 2011 (22) STR 129 (Mad.) and *Oracle Financial Services Pvt Ltd v. Commissioner of Service Tax* 2015 (40) STR 316 (T). The demand confirmed for the period prior to 31st May 2007 is liable to be set aside on this ground itself.

6. He has further contented that the adjudicating authority has wrongly held that Information Technology Software Services was carved out as a separate taxable service so as to comprehensively cover all IT services which were earlier covered under the categories

like 'Maintenance and Repair Service', 'Consulting Engineering Service', etc. It is their contention that the entry introduced at a later date would prevail over the general entry existing at a previous date. The activities like software upgradation, etc. were leviable to service tax for the first time under the taxable category of 'Information Technology Software Services', which cannot be made liable to service tax for the period prior to introduction of the said levy. Further, they have submitted that even assuming without accepting that the activity of maintenance of software is covered under the category of 'Management, Maintenance or Repair Service', import of said service through internet become taxable only w.e.f. 01st March 2008. Therefore, there cannot be any liability to pay tax for earlier period. Elaborating on the said argument they have said that none of the software vendors have send their personnel to India for providing 'Software Maintenance Service' which were provided immediately, either through telecommunication or internet. No evidence has been brought on record by the Revenue that M/s Lear Corporation, USA as the software vendor, actually sends their personnel to India for providing software support service. It is their contention that in view of the proviso to Rule 3(ii) of Import of Service Rules, 2006 there cannot liability on the appellant to discharge service tax on reverse charge basis prior to 1st March, 2008. Assailing the observation of the Learned Commissioner that the said amendment is retrospective in

nature and applicable for the period prior to 01st March 2008, they have submitted that it is settled legal position that any amendment to tax statute creating liability unless specifically incorporated in the statute would not apply with retrospective effect. In support, they have placed reliance on the order of this Tribunal No. A/91120/2017 dated 30th November 2017 passed in the case of *Vodafone Cellular Ltd v. Commissioner of Central Excise, Pune – III.*

7. Further, they have submitted that sharing of costs does not amount to provision of any service. It is their contention that the appellant had shared part of the total common cost incurred in respect of IT infrastructure by M/s Lear Corporation, USA. Such sharing at actual within group companies cannot be considered as provision of service by the overseas entity to the Indian arm. In support they refer to the judgment in the case of *JM Financial Services Pvt Ltd v. Commissioner of Central Excise* 2013-TIOL-757-CESTAT-MUM. Further, they have submitted that the entire exercise is since revenue neutral, therefore, no liability be fastened on the appellant. Besides they have also argued that since the issue relates to interpretation of statutory provisions and the appellant were under *bona fide* belief, therefore, extended period of limitation cannot be invoked and consequential imposition of penalty under various provisions also unwarranted.

8. Ld. A.R. for the Revenue reiterates the findings of the learned Commissioner. He has submitted that as per the software usage agreement, the Appellant was required to pay the annual maintenance charges which their counterpart at USA require to pay various vendors of the software. Hence, the amount paid is nothing but the consideration towards management, maintenance or repair service, hence leviable to service tax under the said category during the relevant period.

9. Heard both sides and perused the records. The short issue involved in the present appeal is whether the services received by the Appellant from M/s Lear Corporation, USA against software usage agreement are in the nature of management, maintenance or repair service as alleged by the Revenue or in the nature of information technologies software service claimed by the Appellant. Besides, whether the amount received under the said agreement prior to 01.3.2008 chargeable to service tax under reverse charge mechanism.

10. Undisputedly, by an agreement between the Appellant and M/s Lear Corporation, USA for usage of software, the Appellant agreed to pay annual maintenance charges which M/s Lear Corporation, USA required to pay to the vendors of the softwares. These charges which have been paid by the Appellant to M/s Lear Corporation, USA has

been claimed as software usage charges and not maintenance charges for the software. Analyzing the issue and evidences on record, the learned Commissioner observed as follows:-

> "16. I find that the Noticee had entered into a 'Software Usage Agreement' with M/s Lear Corporation, USA (non-resident) towards the usage of their Design software. As per the agreement, M/s Lear Corporation, USA paid Annual Maintenance charges to various vendors of these softwares and charged back the said charges proportionately to the Noticee based on the usage.
>
> 17. The contention of the Noticee is that the payments made by them to M/s Lear Corporation, USA in foreign currency were towards the Licence charges for acquiring the right to use of IT software services on a periodical basis. The chargeback by M/s Lear Corporation, USA to the Noticee is to share and support the software licence and not towards 'Management, maintenance or Repair service'. It is further contended that the licenced softwares require continuous maintenance/support right from preparation of scripts, configuration, patch management, application trouble shooting and reporting bugs and fixes etc and that the licenced software received by them require continuous support/maintenance and the support is 24*7.
>
> 18. The Noticee had entered into a Software Usage Agreement with M/s Lear Corporation, USA and accordingly, had been using the Design software. However, the issue under consideration does not pertain to demand of Service Tax on usage of software but pertains to demand of service tax on maintenance of software service received by the Noticee. As per the said agreement, the Annual Maintenance charges paid by M/s Lear Corporation, USA to various vendors who provide maintenance services in respect of software used by the noticee are to be borne by the Noticee. Accordingly, M/s Lear Corporation, USA were raising Bills on the Noticee for recovering such Annual Maintenance charges. The Bills clearly indicate that the amount charged to the Noticee is for software maintenance services provided and not for usage of software per se.
>
> 19. Thus, it is evident from 'Software Usage Agreement' and the Bills raised by M/s Lear Corporation, USA that the amount charged to the Noticee is for the maintenance of the software used by the Noticee. The contention of the Noticee that the payments made by them in foreign currency to M/s Lear Corporation, USA was towards the Licence charges for acquiring the right to use of IT software services on a periodical basis is not supported with any evidence. The Noticee have not produced any documentary evidence to show that the payments made were to acquire the right to use and not on maintenance of software. On the other hand, clause 2 of the 'Software Usage Agreement' and the Bills raised by M/s Lear Corporation, USA conclusively prove that the payments under consideration were

> for maintenance of the software and not for acquiring the right to use IT software. Relevant bills clearly mention the payment is for "Support software maintenance". As such, the contention of the Noticee is not tenable on material facts and the evidences on record and thus, does not merit favourable consideration."

10. Assailing the above findings, the Appellant has submitted that the learned Commissioner has failed to appreciate that under the software usage agreement, the said amount was required to be paid which is equivalent to the maintenance charges paid to the vendors of the software by M/s Lear Corporation, USA. We do not find any evidence in support of the claim of the Appellant that what they were required to pay M/s Lear Corporation, USA was not the maintenance charges for usage of the software but the charges for the software. On the other hand, M/s Lear Corporation, USA had paid to the vendors maintenance charges of the software which they ultimately collected from the Appellant. Therefore, the Ld. Commissioner has rightly classified the services received by the Appellant under the category of management, maintenance, or repair service under Section 65 (105)(zzg) read with Section 65(64) of Finance Act, 1994.

11. The next issue relates to the question whether the services received through internet is taxable from 01.03.2008 as claimed by the Appellant in their alternative submissions. We find that the issue has been considered by this Tribunal in the case of Vodafone Cellular Ltd Vs CCE, Pune III vide Order No.A/91120/2017, dt.30.11.2017, wherein it is observed as follows:-

"5. We have considered the submissions made by both sides. We find that the services repair, maintenance and management of software by the entity situated outside India was carried out through internet. Such services were brought into tax net by insertion of proviso to Rule 3(ii) of the Taxation of Services (Provided From Outside India and Received In India) Rules, 2006 vide Notification No.6/2008-ST, dt.01.03.2008. The said proviso reads as under:-

> Provided further that where the taxable services referred to in sub-clauses (zzg), (zzh)] and (zzi) of Clause (105) of Section 65 of the Act, are provided in relating to any goods or material or any immovable property, as the case may be, situated in India at the time of provision of service, through internet or an electronic network including a computer network or any other means, then such taxable service, whether or not performed in India, shall be treated as the taxable service performed in India;

Thus, the services become taxable by insertion of above w.e.f. 01.03.2008, whereas in the present case, the demand pertains to the period 13.06.2005 to 17.11.2006, hence the service tax is not leviable. Therefore, the demand on this count is not sustainable."

12. Following the aforesaid decision, we are of the view that the Appellant is required to discharge service tax from 01.03.2008. Consequently, the matter is remanded to the Adjudicating Authority to recalculate the demand for the period from 01.03.2008 onwards. Also, we find that imposition of penalty under Section 78 of Finance Act, 1994 is unwarranted. However, penalty under Section 76 and 77 are imposable on the Appellant, hence sustained, which shall be determined on re-computation of the demand for the period after 01.3.2008.

13. In the result, the impugned Order is set aside and the Appeal is partly allowed to the extent mentioned as above.

(Order pronounced in Court)

S D

(C J Mathew)
Member (Technical)

S D

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

cbb