

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT -II

Service Tax Appeal No. ST/52214/2014 [DB]

[Arising out of Order-in-Original No. 150-GB-2013 dated 28/10/2013 passed by the Commissioner, Service Tax, New Delhi]

National Internet Exchange Of India ...Appellant

Vs.

C.S.T. – Service Tax, Delhi **... Respondent**

Present for the Appellant : Mr. B.L. Narasimhan, Advocate &
Ms. Shagun Arora, Advocate

Present for the Respondent: Mr. Amresh Jain, DR

Coram: HON'BLE MR. V.PADMANABHAN, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing: 03.07.2018

Pronounced on : 27.07.2018

FINAL ORDER NO. 52638/2018

PER: RACHNA GUPTA

The present is an Appeal against the Order-in-Original No. 150-GB-2013 dated 28/10/2013 vide which a demand of Rs. 6,54,79,758/- has been confirmed alongwith the penalty of

same amount under Section 78 of the Act and an additional penalty under Section 77 of the Act.

2. The facts relevant for the purpose are that M/s National Internet Exchange of India (NIXI for short) is a not for profit company registered under Section 27 of the Companies Act, 1957 and is engaged in Domain Name Business in India i.e. for providing efficient interconnectivity of internet in India and for setting up of internet domain name operations and related activities. For the purpose the appellant has been entrusted by the Department of Information and Technology under the Ministry of Communication and IT, Government of India vide its policy framework dated 28.10.2004, with the responsibility of setting up the registry for '.in' country got top level domain name (TLD) and for operating as registry for '.in' domain name in India. There is an office order also in this respect dated 20.11.2014. However, the Department on the basis of intelligence gathered alleged that the appellants while appointing registrars to register the domain names were collecting charges per domain name registered by the said accredited registrar per year as registration charges, transfer charges, renewal charges, etc. in lieu of services rendered to these registrars. The said services are alleged to be the franchise services taxable w.e.f. 16.06.2005. Resultantly, the Show Cause Notice dated 14.10.2010 was served upon the

appellants. The demand as raised in the Show Cause Notice has been confirmed vide the impugned order under challenge. Hence, the present Appeal.

3. We have heard Shri B.L. Narasimhan and Ms. Shagun Arora, Ld. Advocates for the appellants and Shri Amresh Jain, Ld. DR for the Department.

4. It is submitted on behalf of appellant that NIXI is an internet registry for India like ICANN is the registry at international level. The Ministry of Communication under the policy framework had given a very specific task to the appellant i.e. to build an infrastructure for '.in' registry and operating the same and also to examine upon an appraisal in this respect as to whether they have the requisite expertise and sufficient degree of training to allot domain names and upon being satisfied assign them as the role of registrars relating to registration of domain names. It is impressed upon that the registry i.e. appellant and their accredited registrars are two different entities as is very much clear from the registry accreditation agreement entered into between the two. It is further submitted that a sum of Rs. 50,000/- as received by the appellant from its registrars is again under the mandate of policy framework of Government of India to receive the

same as accreditation fee. No services in lieu of said amount are being provided by the appellant to the registrars. The findings of the Adjudicating Authority below are alleged to be wrong in this context. Penalties are also impressed upon to have been wrongly levied upon. Order is prayed to be set aside and Appeal is prayed to be allowed. The following case laws are relied upon:

- **Direct Internet Solutions Pvt. Ltd. Vs. CST, Mumbai, 2014 TIOL 1505 CESTAT (Mum)**
- **Delhi International Airport Pvt. Ltd. Vs. Union of India & Ors, 2017 TIOL 394 HC DEL ST**

5. While rebutting these arguments, Ld. DR has justified the impugned order. It is impressed upon that from the documents provided by the appellant under the stage of investigation the original Adjudicating Authority has rightly concluded that the appellant are raising monthly invoices on their accredited registrars with all the billing descriptions. In view thereof, merely mentioning their registrar to be the accredited registrar will not take them out of the ambit of the term franchise. Thus, the value received is for rendering the taxable service as defined under Section 65(47) of Finance Act, 1994 and as is taxable under Section 65(105) (z) of the Act. The findings that NIXI/ appellants are the franchisers and their registrars as the franchisee are impressed upon to have no

infirmity. The Order to that extent is prayed to be upheld. However it is mentioned that the Adjudicating Authority below has wrongly denied the invocation of extended period. It is submitted that the findings in the Order to this aspect are contradictory. Above all, the appellant were not showing the alleged collection fee in their ST return which was the sufficient ground for the Department to invoke the extended period of five years while serving Show Cause Notice upon the appellants, the findings of the impugned Order to that effect are therefore prayed to be set aside. Resultantly, the Department has prayed for the appellant's Appeal to be allowed whereas for respondents Appeal to be rejected.

6. After hearing both the sides, our considered opinion is as follows:-

The moot question for adjudication in the present case appears to be as to whether the registrar accreditation agreement is a mere agreement between the appellant and its registrar for accreditation or it actually is in agreement for rendering franchise services by the appellant to its registrars.

For the purpose it is important to know the definitions of the franchise, franchiser and franchise service and the same is as reproduced below:

"65 (47) "franchise" means an agreement by which the franchisee is granted representational right to sell or

manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved

65 (48) "franchisor" means any person who enters into franchise with a franchisee and includes any associates of franchisor or a person designated by franchisor to enter into franchise on his behalf the term "franchisee" shall be construed accordingly."

Franchise Services are made taxable under Section 65 (105) (zze) of the Finance Act. From these definitions it is clear that two components are important for an arrangement of franchise:

- (a) The grant of representational right
- (b) Identification with the franchisor

Representational right permits the person to represent himself as someone else to the external world such that the external world feels that he is procuring goods or services from the brand owner which can be termed as franchise rights. For the purpose franchise must surrender his own identity and in addition must step into the shoes of the franchisor.

7. To apply these definitions and the applicability thereof to the facts of the present case, the appreciation of contents of registrar accreditation agreement between the appellant and

its registrars is necessary. The perusal of the agreement makes one thing abundantly clear that not even once the word "franchise" or "franchisor" has been used. The agreement defines accredit in Clause 1.1 thereof to mean to enter into an agreement that sets forth the rules and procedures applicable to the provisions of registrar services. The two parties of the agreement are '.in' registry i.e. appellant including its successors (Clause 1.5) and registrar as the second party (Clause 1.9). Registrar services (Clause 1.10) are absolutely different from registry services as in Clause 1.15 of the agreement. It makes clear that the agreement gives the registrar no right, power or authority to operate or manage '.in' registry. He is only required to act as registrar for top level domain through '.in' registry services that too till the registrar is accredited. Clause 3.2 of the agreement clarifies that except for the assigned role or purpose, no other use of the '.in' registry's name or website is licensed vide this agreement. The registrar is prohibited from assigning or sub-licensing his services. The agreement also includes the supervisory authority of '.in' registry upon its registrars empowering them to even take the penal actions against registrars who otherwise are prohibited from selling WHOIS check (name available look out) data. Not only this, Clause 9.16 of the agreement permits each party to independently own its intellectual property including all patents, trademarks, trade names, service marks, trade secrets, property process

and all other forms of intellectual property. Both the parties into this agreement recognised that they shall have no right, title or interest or claim over the others intellectual property.

8. The above provisions make it abundantly clear that the appellant and its registrars have their separately assigned roles. Registrar are accredited for discharging such particular functions of the appellant for which they are accredited by the appellant. Otherwise also, in today's world of international connectivity, database of all domain name is required to be maintained. There is a need to link a particular domain name with the particular computer and the internet protocol. What is also apparent from the above discussed agreement is that the registrars are the entities which contract with the registered name holders and the registry and collects registration data about registry name holders and submit the same to the registry for entering in the database maintained by the registry. It becomes abundantly clear that both registry and registrars are independent entities operating on principle-to-principle basis. Thus, the conditions of the above discussed definitions are not fully satisfied in the present case.

9. The emphasis of the Ld. Counsel for appellant on the agreement between ICANN, the corresponding registry at

international level seems appealable in view of above opinion and the case law of Direct International Solutions Pvt. Ltd. (supra) is opined squarely applicable to the present case. The relevant provision of the said decision is extracted below:-

"36. From the mission and core values as also the agreement between ICANN and the appellant we are not able to find out any service or a process for which ICANN is associated and is being provided by the appellant. Appellants provided registrar service as per the powers under Article II of powers for ICANN, ICANN is prohibited from acting as registrar. From the agreements or from the bylaws, we are not able to find any process that has been developed by the ICANN and being used by the appellants. We find what is being done by the ICANN is to set minimum standards for the performance of registration function and recognize that the appellants are meeting those standards. Revenue has not been able to pinpoint to us either any service or any process for which ICANN is known and that process is being used or being provided by the appellants. In the absence of any such service or process we are unable to agree with the Revenue that the appellants are franchise service of ICANN. Even the agreement which permits the use of ICANN symbols clearly indicates that appellants are ICANN Accredited Registrar and nothing beyond that. We are in agreement with the appellant's submission that accreditation and representing the ICANN are two different things and the

appellants are only accredited by ICANN and they are not representing ICANN."

Hon'ble Delhi High Court in another case titled International Airport (supra) has held that for a transaction to be taxable under Section 65(105) (z), it is necessary that the services should be provided by the appellant but the agreement makes it clear that there is no provision of services being provided. Clause 3.5.3 thereof is relevant.

10. In view of the entire above discussion, we have no hesitation in holding that the original Adjudicating Authority has miserably erred while holding an arrangement of accreditation as that of providing franchisee services. The levy confirmed vide the Order under challenge is therefore set aside.

11. Further, the original Adjudicating Authority has held that there is clear cut suppression of facts on the part of the appellant on the ground that despite receiving the consideration for accreditation, the same was not informed to the Department. But in view of the above findings, we are of the opinion that no services as alleged by the Department have been rendered by the appellant. Show Cause Notice in fact was wrongly served. In the given circumstances, there seems

no ground available with the Department to invoke the extended period of limitation while serving the said Show Cause Notice. The imposition of penalty on the settled ground vide the impugned order are also therefore set aside. Resultantly, the Order under challenge is set aside and Appeal is hereby allowed.

[Pronounced in the open Court on 27.07.2018]

(RACHNA GUPTA)
MEMBER (JUDICIAL)
D.J.

(V.PADMANABHAN)
MEMBER (TECHNICAL)