CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

REGIONAL BENCH – COURT – 1

Appeal(s) Involved:

Service Tax Appeal No.218 of 2009

[Arising out of Order-in-Original No. 25/2008 dated 24/12/2008 passed by the Commissioner of Central Excise, Mangalore.]

M/s. Manipal Universal Learning Pvt. Limited
Syndicate House
Manipal - 576 104.

Appellant(s)

Versus

The Commissioner of Central Excise
7th FLOOR, TRADE CENTRE,
BUNTS HOSTEL RD.,
MANGALORE – 575 003.
KARNATAKA

Respondent(s)

Appearance:

Mr. K. S. Ravi Shankar,
Mr. N. Anand & Mr. N. Satish Kumar,
Advocates
No. 152(18), Race Course
Bangalore – 560 001.
Karnataka

For the Appellant

Mrs. D. S. Sangeetha,
Jt. Commissioner (AR)

For the Respondent

Date of Hearing: 18/09/2019
Date of Decision: 20/12/2019

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 21295 /2019

Per : P. ANJANI KUMAR

The brief facts of the case are that the appellant is engaged in the activity of providing education *through distance education program for Universities.* During the period of dispute, the Appellant entered into a Memorandum of Agreement (MOA) dated 11.11.2004 with Sikkim Manipal University of Health, Medical and Technological Sciences, for (i) promotion of distance education program of SMU in Clause 4 of the MOA and (ii) to provide infrastructure and services as per Clause 5 of the MOA. The Appellant has in-turn entered into an agreement called *Learning Centre Agreement* (**LCA**) with various parties granting licence to set up an authorised Learning Centre of the Appellant with respect to distance education programmes of Universities with whom the Appellant has entered into contracts. In terms of this LCA, the party has agreed to provide infrastructure and facilities for the purpose of providing distance education programme of SMU/other Universities. Since the entire activity is a "distance education programme" the Appellant has supplied VSAT (Very Small Aperture Terminal) equipment to the contracting party. In terms of LCA, the Appellant receives consideration as follows from the contracting parties - (i) Affiliation fee; (ii) Inspection Fee; (iii) Licence Fee; (iv) One-time VSAT Management Fee and (v) Actual VSAT user costs/reimbursements.

2. Revenue, after investigation, issued a show cause notice, dated 11.3.08, demanding service tax in respect of (i) Affiliation fee; (ii) Inspection Fee; (iii) Licence Fee, under the category of "franchise service". The said notice was adjudicated by passing OIO No.15/2008 dated 2.7.08. The Appellant did not contest the OIO and paid the service tax along with interest and penalty. Revenue issued another show cause notice dated 26.5.08 alleging that the appellant is liable to pay Service tax, on the VSAT charges received (both onetime fee and usage charges), under "franchise service" for the period July 2003 to August 2007. Commissioner, vide 0I0 No.25/08 dated 24.12.08 (impugned order), confirmed the demand of Rs.

87,40,770 with equal penalty under Section 78 and other penalties, invoking the extended period of limitation. Hence, the present appeal is filed.

3. Shri Ravi Shankar, senior Counsel, appearing for the appellants submits that as both agreements with SMU and the parties running Learning Centres did not involve any kind of "franchise" but were in the nature of "auxiliary education services"; the Appellant entertained a *bona fide* belief that they were not liable for payment of service tax under the category of "franchise service" as defined in section 65(105)(zze) read with Section 65(47) & (48) of the Act; it was understood by the Appellant that VSAT equipment hire charges related to Chattel hire; the same was a transfer of property and right to use falling within the ambit of the definition of *sale* in terms of Article 366 of the Constitution and not a service as contemplated by law during the relevant period.

4. Learned Counsel submits that the Department is not at all justified in invoking the extended period of limitation since the Department has issued two SCNs for the very same period based on very same relied upon documents; When all facts were on record and entirely within the knowledge of the department based on which it had issued an earlier SCN, the second show cause notice could not have alleged suppression of facts or any ingredients envisaged in the proviso to Section 73 to saddle the appellants with charges of quasi-criminal nature once again; the demand is wholly bereft of legality and barred by limitation; this solitary ground is by itself is meritorious enough to set aside the impugned order which is totally bereft of merit, hit by the bar of limitation. He places reliance on the following.

(i). Nizam Sugar Factory Vs CCE, 2006 (197) ELT 465 (SC)
(ii). ECE Industries Ltd Vs CCE, 2004 (164) ELT 236 (SC)
(iii). Hyderabad Polymers (P) Ltd Vs CCE, 2004 (166) ELT 151 (SC)
(iv). FJA Vs CCE, 2003 (153) ELT 1J. (SC)
(v). CCE v. Rivaa Textiles Inds. Ltd 2015 (322) ELT 90 (Guj)
(vi). Para Food Products Vsv. CCE, 2005 (184) ELT 50 (Tr-Bang.).

5. The Learned Senior Counsel submits that the appellant registered with the Service tax department during the year 2004 itself; since then there has been protracted correspondence with the Department on several issues; Appellant has also been subjected to periodical visits; they have been subjected to adjudication proceedings on several issues in the past; hence, all the facts and circumstances are well within the knowledge of the Department; besides, all the transactions are duly recorded in the books of accounts maintained by the Appellant; there is no suppression of anything from the books; there is no willful suppression of facts on the part of the Appellant in any manner. He relies on the ration of the decision in *Continental Foundation Joint Venture v. CCE,* 2007 (216) ELT 177 (SC).

6. Learned Senior Counsel submits that the Respondent has shown supine indifference to the pleas advanced by the Appellant and made out specious grounds to fasten an illegal levy without any justification either on merit or on limitation; the order has been passed without application of mind; the order violates natural justice as it is not demonstrated that justice has not only been done but has been manifestly and undoubtedly seen to be done from the record; He submits that the demands confirmed are not tenable on merits also for the following reasons –

(a) There was no "franchise service" rendered by the Appellant either to Sikkim-Manipal University or to parties of Learning Centres; MOA dated 22.11.04 with Sikkim Manipal University was for providing *auxiliary education services* in relation to distance education programme of the University; this MOA was not in the nature of "franchise" as defined in Section 65(47) as it stood both prior to 16.6.2005 and post 16.6.2005 amendment; there was no "representational right" granted to the Appellant; so is the case with the agreements entered by the Appellant with parties of Learning Centres under LCAs; the thrust of the MOA and LCA was to provide infrastructure facilities and services in relation to distance education programmes. Senior Counsel avers that there is nothing in the impugned order to establish that the ingredients of the definition of "franchise" in Section 65(47) are present or satisfied; there is no "royalty" received towards any "franchise service"; insofar as the activity of supply of VSAT

equipment is concerned, the same was not towards any rendering of "franchise service". He places reliance on the following.

(i). KEHEMS Consultants Pvt Ltd Vs CCE, 2015 (39) SIR 82 (Tri-Del.);
(ii). *Centre for development of Advance Computing Vs CCE,* 2016 (41) SIR 208 (Tri-Mum.);
(iii). *Delhi International Airport Pvt Ltd Vs UQI,* 2017 (50) SIR 275 (Del.);
(iv). *CST Vs Bharat Petroleum Corporation Ltd.* 2018 (10) GSTL 364 (Tri-Mum.) affirmed in 2019 (24) GSTL 347 (Bom.)
(v). *Franch Express* Network (P) Ltd Vs CST, 2008 (12) SIR 370 (Tri-Che.).

7. Learned Senior Counsel submits that the scope of "franchise service" is also clarified by the Board vide Circular No.59/8/2003-ST dated 20.6.03; impugned order has not considered the above in perspective; they had supplied VSAT equipment to parties running Learning Centres for which they charged one-time VSAT Management Fee; this amount is not towards any "representational right" but towards supply of 'goods' viz., VSAT equipment; this cannot be construed as consideration towards "franchise"; reliance is placed on the decision in *IMA Mental Arithmetic Academy Pvt Ltd Vs* CST, 2019 (22) GSTL 234 (Tri-Che.). The impugned order is not tenable in law.

8. Learned Senior Counsel submits that in terms of para-4.5 of LCA, the Appellant provides VSAT to Learning Centres and they charge one-time fee for the same called as VSAT Management Fee; this is nothing but *supply of tangible goods;* as regards VSAT usage fee charged and collected by the Appellant, it was reimbursement of expenses incurred towards transmission of information; VSATs work on the basis of internet/telephone connection for disseminating information/data during distance education programme by Learning Centres; for this purpose, the Appellant has taken services of telecommunication from Airtel India Ltd who invoice/bill the Appellant for data usage charges which are recovered by the Appellant from the Learning Centres as reimbursements; this again has nothing to do with "franchise service" but only a reimbursement of telecommunication costs/expenses; this was clearly explained by the Appellant to the Department vide their letter dated 27.11.07, which was not appreciated the facts in perspective; at any rate reimbursement of expenses cannot be brought to tax in view of the judgment *of the Delhi High Court in Intercontinental Consultants & Technocrats Pvt Ltd Vs UOI,* 2013 (29) SIR 9 (Del.) as affirmed by the Supreme Court in 2018 (10) GSTL 401 (SC); the impugned order is wholly

devoid of legality. Learned Senior Counsel submits that at best the activity of supply of VSAT could come under the activity of *"supply of tangible goods" vide section 65(105)(zzzzj)* of the Act w.e.f.16.5.2008; hence, for the period in question, VSAT management fee charged towards supply of goods cannot be subjected to service tax during the period in question. He places Reliance on the decision in *Indian National Ship-owners Association Vs UOI,* 2009 (14) SIR 289 (Born.) and *Jindal Drilling* & Industries Ltd Vs CST, 2014 (41) STR 203 (Tri-Mum.). As regards, VSAT usage fee they were wholly in the nature of telecommunication costs apportioned and recovered as reimbursement; this amount has already suffered tax inasmuch as Airtel who is the supplier of the said service has already charged service tax on the same under the taxable category of 'telecommunication service'.

9. Learned AR appearing for the Revenue reiterates the findings of OIO.

10. Heard both sides and perused the records of the case. Brief issues that require consideration in this case or as to Whether VSAT (Very Small Aperture Terminal) fee (both one-time fee for supply of goods and actual usage charges) charged for supply of VSAT equipment is liable for service tax under "franchise service' under sections 65 (105) (zze) read with Sections 65(47) & (48) of the Finance Act, 1994 and as to Whether demands are wholly barred by limitation.

11. At the outset, we find that Learned Senior counsel has made out a strong case on the issue of limitation. It is evident on records that the appellants are registered with the department and are in continuous correspondence with the department and various visits of Audit teams have taken place. Moreover, the department has issued a Show Cause Notice dated 11.3.08, demanding service tax in respect of (i) Affiliation fee; (ii) Inspection Fee; (iii) Licence Fee, under the category of "franchise service". The SCN is based on the same set of contracts and other documents. Therefore, we hold that the department is not within their right to issue a second show cause notice alleging suppression. Going by the ratio of Apex Court's judgment on the case of Nizam Sugar Factory (Supra) we find that the SCN and the OIO are liable to be set aside.

12. We will endeavor to touch upon the issue on merits though we have held that the issue is barred by limitation. Ongoing through the Learning Centre Agreement, we find that Clause 4.5 reads as under.

> *"4.5. In order to enable the Participant to duly fulfil its obligations hereunder, MUL shall provide a VSAT to the Participant for exclusive use at the Learning Centre, upon payment of a non-refundable fee as set out in Annexure B. The Participant shall comply with the requirements of MUL including the provisions of the Operations Manual with respect to the operation, maintenance and safeguard of the VSAT. For the sake of clarity it is hereby confirmed that the ownership of such VSAT shall always vest with MUL".*
>
> *11.1 (h) The participants shall not describe itself or act as an agent or representative of MUL.*
>
> *15.1 It is understood that the arrangement between the parties contemplated by this agreement shall be on a principal-to-principal basis. None of the provisions of this agreement will be deemed to constitute a Joint Venture, agency, a partnership or principal-agent relationship between the parties hereto and neither party by virtue of this agreement, shall have the right, power or authority to act or create any obligation, express or implied, on behalf of the other party. The participant shall not expressly or by implication or conduct under any circumstance, represent itself to be an agent of MUL and no act of the participants as is not specifically authorised by MUL shall be binding on MUL."*

13. We find that nothing in the agreement indicates that the learning Centres have been given a franchise by providing the VSAT at the learning Centres; Nothing is forthcoming from the contracts that appellants gives permission to use their name by providing the VSAT facility. We also find that the appellants are not receiving any royalty towards the alleged franchise. Therefore, it is incorrect to classify the same as 'Franchise' service. We find that CBEC circular No.59/8/2003 dated 20-6-2003 clarifies at Para 2.4 that unless the following ingredients are satisfied, the agreement cannot be called as franchise agreement.

(i). the franchise is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with

franchiser, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved;

(ii).the franchiser provides concepts of business operation to franchise, including know how, method of operation, managerial expertise, marketing techniques or training and standards of quality control except passing on the ownership of all know how to franchise;

(iii).the franchise is required to pay to the franchiser, directly or indirectly, a fee and

(iv).the franchise is under an obligation not to engage in selling or providing similar goods or services or process, identified with any other person.

It was also clarified it includes that the franchisee requires to follow the concept of business operation, managerial expertise, market techniques of the franchiser.

14. We find nothing related to grant of representational rights present in the instant case and all the ingredients listed above are not present. Therefore, the agreement cannot be termed as 'franchise' agreement and hence, Service Tax under that head is not leviable. We find that the coordinate bench of the Tribunal held in the case of IMA Mental Arithmetic Academy Pvt Ltd Vs CST, 2019 (22) GSTL 234 (Tri-Che.) that only those amounts directly relatable to 'representational right' granted by the franchisor to franchisee and royalty/franchise fee towards that right alone be part of taxable value under 'franchise' service; admission fee, tuition fee, competition fee and course instructor fee was not liable for service tax under "franchise service".

15. We find that Learned Senior Counsel rightly submits that the activity at best could come under the activity of *"supply of tangible goods" vide* Section *65(105)(zzzzj)* of the Act w.e.f.16.5.2008; hence, for the period in question, VSAT management fee charged towards supply of goods cannot be subjected to service tax during the period in question. However, the Show

Cause Notice has not demanded duty under this category and therefore discussion on the same is not warranted. We further find as regards VSAT usage fee, as submitted by Senior Counsel, it is in the nature of telecommunication costs apportioned and recovered as reimbursement. Therefore, such charges are not liable to service Tax as held in the case of Indian National Ship Owners Association (supra).

16. In view of the above, we find that the impugned order does not survive both on limitation and merits; therefore, is set aside. The appeal is allowed with consequential relief, if any, as per law

(Order was pronounced in Open Court on **20/12/2019.)**

S.S GARG
JUDICIAL MEMBER

P. ANJANI KUMAR
TECHNICAL MEMBER

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