

Tata Technologies Limited Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : May-25-2007

Reported in : (2007)10STT25

Judge : J T T.K., M Ravindran

Appellant : Tata Technologies Limited

Respondent : Commissioner of Central Excise

Judgement :

1. This appeal has been filed against the Order-in-Original No.05/ST/2006 dated 5.7.2006 passed by the Commissioner of Central Excise, Pune-I.2. The appellants are provider of services like online data processing, Cad Cam designing, annual maintenance of SAP, etc. to their clients.

They are project executors for SAP software provided by M/s. SAP AG and are license holders for SAP application and maintenance in India. The Revenue issued show cause notice to the appellants alleging that the services provided by the appellants in respect of ERP software system was chargeable to service tax for the period from time to time 1.3.2000 to 9.9.2004. By way of Notification No. 16/2004-ST dated 10.9.2004 taxable services provided to a client in respect of ERP software system by a management consultant was exempted from the whole of service tax leviable thereon. In the impugned order, the Commissioner has confirmed the demand of Rs. 1,77,45,021/- from the appellants. The interest under Section 75 of the Finance Act, 1994 was imposed. The penalty of Rs. 200/- per

day under Section 76 was imposed. The penalty of Rs. 1,000/- under Section 77 was imposed. Under Section 78, the penalty equal to the service tax demand was also imposed. The appellants are highly aggrieved over the impugned order. Hence, they have come before this Tribunal for relief.

3. Shri V. Sridharan, learned Advocate appeared on behalf of the appellants and Shri S.N. Prasad, learned SDR appeared for the Revenue.

1. It was submitted by the learned Advocate that the appellants entered into an agreement dated 31.3.1997 with SAP India whereby the appellants were granted non exclusive and non transferable license to use SAP R/3 software for 5000 users. Due to this agreement, Tatas as a group benefited by lower license fees as also lower annual maintenance charges (AMC). The appellants paid license fees to SAP India per user for 5000 users as para 5 of Appendix 1 to the agreement. Each affiliate was required to enter into a separate tripartite agreement with SAP India and the appellant. The appellants in turn, billed the affiliates depending upon the number of users. The appellants also collected some extra amount to cover the cost incurred by the appellants in negotiating annual maintenance fees with SAP India, in maintaining relationship with SAP India, in fulfilling the various legal and regulatory requirements on behalf of the affiliates and to recover interest cost because the annual maintenance fees are paid to SAP India at the beginning of the period and thereafter recovered from the affiliates.

2. Since the Central Government issued a Notification No. 16/20004-ST dated 10.9.2004 exempting taxable services provided to a client in respect of ERP software system by a management consultant from the service tax. The Revenue holds the view that prior to 10.9.2004 the services provided in respect of ERP software system was chargeable to service tax in the category of management consultant. In the show cause notice, suppression of facts alleged, therefore extended period was invoked. In the impugned order, the Commissioner has confirmed the proposal in the show cause notice.

3. The appellant was only acting as pass through agency for the affiliates whereby the affiliates received the SAP maintenance service directly from the SAP India. Since the appellant procured SAP licenses for TATA group companies, the annual

maintenance for the same was also routed through appellant. Therefore, the appellant is not liable to pay service tax under heading 'management consultant'.

4. The appellant was only acting as a co-ordinating agency between SAP India and the affiliates. The appellant did not undertake any of the activities referred to in para 7 of the agreement dated 31.3.1997.

5. Only SAP India or its parent company has right to modify/upgrade SAP software. The appellant has neither right nor access to the source code of the SAP software. In such a situation, the appellant is incapable of providing SAP maintenance services.

6. In view of the above submissions, the amount recovered by the appellant from the affiliates towards maintenance service fees paid to SAP India is not liable to service tax since the service, if any, has been provided to affiliates by SAP India and not by the appellant.

7. The Commissioner relied on the Section 67 to hold that the gross amount charged by the appellant from their affiliates would be chargeable to service tax without being eligible for any deduction towards license fee payable by the appellant to SAP India. The Commissioner observed that the license fees paid by the appellant to SAP India are for consideration for services received by the appellant which are used for providing output services by the appellant to the affiliates. It can never be said that the appellant used the annual maintenance service provided by SAP India for 5000 users when actually the affiliates are using the software for 3457 users. The finding of the Commissioner is perverse.

8. The appellant is not providing any consultancy, advice, or technical assistance relating to modification, rectification or upgradation or working system of the clients.

9. Notification No. 04/1999-ST dated 28.2.1999 exempted the taxable services provided to any person by a consulting engineer in relation to computer software from payment of whole of service tax leviable thereon. The notification exempted any engineer who provides any consultancy, advice, and technical assistance in

relation to computer software from payment of service tax. As per the allegation in the show cause notice, the appellant provided advice, consultancy and technical assistance. There cannot be any doubt that advice, consultancy and technical assistance, even if assumed to be provided in relation to SAP R/3 software is computer software. Therefore, the notification squarely covers the case of the appellant and therefore, the appellant even if held to be management consultant is eligible to avail the benefit of exemption notification No. 4/99-ST during the period of dispute.

10. The need to issue Notification No. 16/2004-ST dated 10.9.2004 giving exemption to services provided by management consultant in relation to ERP software arose only because of Notification No. 4/99-ST was withdrawn with effect from 10.9.2004. The definition of taxable service in relation to 'consulting engineer' was amended with effect from 10.9.2004 as under: (g) to a client by a consulting engineer in relation to advice, consultancy or technical assistance in any manner in one or more a discipline of engineering but not in the discipline of computer hardware engineering or computer software engineering, 11. Therefore in the absence of the Notification No. 4/99-ST which was earlier taking care of any engineering service in relation to computer software provided either as engineer or management consultant, it became necessary for Government to issue Notification No. 16/2004-ST. Hence, the finding of the Commissioner that for the period prior to 10.9.2004, service provided by management consultant in relation to ERP software was taxable is clearly incorrect.

12. The only basis for issuing the present show cause notice is the Notification No. 16/2004-ST dated 10.9.2004. The appellant was of the view that services provided in relation to ERP software is exempt from service tax. The department was of the same view. The department initiated the enquiry only because of issue of Notification No. 16/2004-ST dated 10.9.2004. The proceeding initiated by the department is a result of change of opinion.

Therefore, there is no ground to allege suppression of facts on the part of the appellant and to invoke the extended period of limitation.

13. Since no service tax is payable and therefore, the question of imposition of penalty and recovery of interest does not arise.

Moreover Section 80 of the Finance Act, 1994 provides that no penalty under Sections 76, 77 and 78 of the Act shall be imposed if the appellant shows reasonable cause for failure to comply with the provisions. The provision of Section 80 is clearly applicable in the case of appellant. Therefore imposition of penalty on the appellant is incorrect.

14. The learned Advocate relied on the case of SAP India Systems, Application and Products in Data Processing Pvt. Ltd. v. Commissioner of Service Tax, Bangalore 2007 (5) STR 439 (Tri.) wherein it was held that M/s. SAP India rendered the services to consulting engineering services in relation to software for the period from 16.10.1998 to 31.3.2000. In other words, the learned Advocate impressed upon the Tribunal has already held for the period which is relevant in the present case. The services rendered by SAP India in relation to software amounts to only consulting engineering services since such services are exempted, there is no liability for payment of service tax.

4. Shri S.N. Prasad learned SDR reiterated the impugned order-in-original.

5. We have gone through the records carefully. The point at which the issue is whether the appellant is rendering any management consultancy service and whether they are liable to pay service tax for the period mentioned in the show cause notice. The appellant M/s. Tata Technologies Limited have furnished an agreement dated 31.3.1997 whereby SAP India granted license to the appellants to use SAP or ERP software for 5000 users. It is seen that the appellant is nodal agency to act on behalf of the Tata group company. In simple words, in terms of agreement entered between SAP India and the appellant, SAP India grants a license to use SAP proprietary ERP software upon the terms and conditions set forth in the agreement. In fact, the said software is meant for use of the Tata group companies in terms of para 2.2 of the above agreement. The use of the software is permitted to the affiliates of the appellant who are all group companies. Each affiliate enters into agreement with the SAP India for the use of software. The amount of license fee shall be calculated based on the total number of users and

software license. There is also provision of fees for maintenance service. Even the appellant has to pay license fee to SAP India. The appellant in turn collects the share of each affiliate and passes it on to SAP India. From this one thing is clear that the appellant is not rendering management service in relation to software. In other words, the software is actually provided by SAP India. There is also tripartite agreement entered into by SAP India, the appellant and affiliates of the appellant. Each affiliate places purchase order on the appellant for SAP software and also SAP AMC (annual maintenance contract). The appellant raised the invoice on the affiliate for SAP AMC. Actually SAP India delivers software to the affiliates of the appellant. The appellant received the amount for SAP software and also annual maintenance from the affiliates and pays the same to SAP India.

We have gone through all the records produced by the appellant. It is very clear that the appellant only acts as agent for SAP India. They enable the group companies of Tata group to procure the SAP software and its maintenance. In the circumstances, we cannot come to the conclusion that the appellant provides management consultancy service to the affiliates. Therefore the demand of service tax on the appellant on the ground that they provide management consultancy service is not sustainable. The appellant is not liable to payment of any penalty or interest. Hence, we set aside the impugned order and allow the appeal with consequential relief.

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