

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, MUMBAI
COURT NO-I**

Appeal No.ST/491/12

**Arising Out of the Order-in-Original No.41/2011-12 Dated: 30.3.2012
Passed by The Commissioner of Service Tax, Mumbai**

DIRECTI INTERNET SOLUTIONS PVT LTD

Vs

COMMISSIONER OF SERVICE TAX, MUMBAI

**Date of Hearing: 12.3.2014
Date of Decision: 5.8.2014**

Appellants Rep by: Mr Sandeep Chilana, Mrs Aurica Bhattacharya, Advs. And Mr Sunil Ghabbawala, CA
Respondent Rep by: Mr D K Acharyya , Special Counsel

CORAM: S S Kang, Vice President
P K Jain, Member (T)

ORDER No.A /1318/14

Per: P K Jain:

1. The appellant is engaged in the activity of registration of website domain names. Any user who need to access a particular website, the user's computer would need to access information from the specific server. This can be done by identifying each computer on the internet network with a unique identification which is known as domain name. The domain name identifies the location of a particular website on the network of millions of computer on the internet. As an illustration www.google.com means that (i) "www" is the worldwide web (ii) "com" represent the top level domain (TLD) and (iii) " google " represent the second level domain. The second level domain can serve requirement of specific entities like 'business', 'company', etc.

2. Data base of all domain name is required to be maintained. There is a need to link a particular domain name with a particular computer on the internet protocol. The Registrar are entities which contract with the registered name holders and the registry and collects registration data about the registered name holders and submit the same to the registry for entering in the data base maintained by the registry.

3. As mentioned earlier, appellant is engaged in the activity of registration of website domain names i.e. appellant is a registrar. The appellant is also accredited by International Corporation for Assigned Names and Numbers (ICANN) for certain top level domains. The appellant is registering domain names permitted by ICANN and ICANN accredited registries. The appellant is paying fee as per agreements, fixed and variable to ICANN and various registries (who are also accredited by ICANN).

4. The first Show Cause Notice dated 4.2.2011 is issued for the period from March 2006 to November 2010 and is in respect of the foreign remittance made by the appellant during the

Source- www.taxguru.in

said period to the ICANN and ICANN accredited registries. The demand is on reverse charge basis.

5. The appellant has been appointing resellers for worldwide services of registration, renewal, cancellation, deletion of domain names and has been collecting charges for the services rendered.

6. The second Show Cause Notice dated 19.10.2011 is issued for the period April 2006 to March 2011 and is on account of amounts received by the appellant during the said period from all the resellers.

7. Both the demands are confirmed in the impugned order on the reverse charge basis. Both the demands have been made under the category of "franchise services" under Section 65 (105) (zze) of the Finance Act, 1994.

8. The learned advocate for the appellant's main contention is that the activities carried out by the appellant does not qualify as franchise services. In support of his contention it is submitted that Section 65 (47) of the Finance Act, 1994 defines franchisee to mean 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. Further Section 65 (48) of the Finance Act defines the term "franchisor" to mean any person who enters in to franchise with a franchisee and includes any associates of franchisor or a person designated by franchisor to enter into franchise on his behalf and the term "franchisee" shall be construed accordingly.

9. The learned advocate submitted that from the definition of the franchise services, two import phrases are to be noted i.e. "grant of representational right" and "identification with the franchisor". Representational right permits a person to represent himself as someone else to the external world such that the external world feels that he is procuring the goods or services from the brand owner which can be termed as franchise right. It was submitted that in view of this, two important ingredients must be present for franchise - (a) the franchisee must surrender his own identity; and (b) franchisee must step into the shoes of the franchisor. The contention of the appellant was that there is no representational right granted to the appellant by the alleged franchisor "ICANN". Moreover the activity carried out by the appellant is not identified with the alleged franchiser and therefore no service tax is payable by the appellant. The appellant is merely accredited as a domain name registrar. The relationship between ICANN and the registrar is defined by the agreement between the two. In the said Agreement (i) Sub-clause 2.1 grants the accreditation to the registrar; (ii) Sub-clause 2.2. permits the registrar to state that it is accredited by ICANN and to link to pages and documents within the ICANN website; and (iii) Sub-clause 2.3 deals with general obligations.

10. The learned advocate for the appellant submitted that the department's case revolves around clause 2.2 of the agreement. Based on the said sub-clause 2.2, the department contended that the said sub-clause permits the appellant to use the brand name of ICANN and use of such brand name results in a crucial branding advantage to the appellant which is not available to an ordinary registrar and therefore a representational right is granted. The learned advocate for the appellant contended that there is a huge difference representing ICANN and stating that the appellant is an ICANN accredited registrar. The appellant is not even allowed to use the ICANN logo in isolation. Even the website of the appellant shows the appellant's own logo and identity and shows the ICANN accredited registrar mark. It is apparent from the website that the appellant conducts business under the brand name of Public Domain Registry and does not represent itself to be ICANN. The appellant is only stating that they are accredited by ICANN, and not they are ICANN. The learned advocate submitted that the situation is similar to a company certified by ISO. It was contended that to treat the transaction as franchise, it is important that the franchiser should have granted a representational right, and the customer should feel that it is the franchiser who is undertaking the business. These ingredients are not present in this case.

Source- www.taxguru.in

11. The other contention of the learned advocate for the appellant was that their activities cannot be identified with the alleged franchisor i.e. ICANN. It was submitted that the definition of franchisee service requires that the goods or services should be identified with the franchisor. This is evident from the definition as also the clarification issued by the Board vide Circular F.No . B1/6/2005-TRU dated 27.7.2005. Para 23.3 of the said Circular states that similarly, if rights are granted for rendering services identified with the principal on his behalf, such services by the principal to the service recipient would be taxable. In the present case, the said requirement is not satisfied. In fact, ICANN is prohibited from entering into the business of domain name registration. It is only permitted to control and supervise the said activity. In fact the domain name of ICANN itself is registered by someone else and not by ICANN itself. It was submitted that the condition of the product or process being identified with the franchisor is not fulfilled and hence current arrangement is only that of accreditation and not that of franchise.

12. The other contention of the learned advocate for the appellant was that the agreement entered by the appellant does not indicate any franchisor - franchisee relationship. It was contended that as per the registrar accreditation policy any person can apply for accreditation and if the qualifications are fulfilled, ICANN has no right to refuse accreditation. Moreover, ICANN cannot impose any commercial restrictions and accredited registrar is free to conduct his business in any manner and under any brand. These aspects of the agreement are fundamentally different from a franchise agreement where it is always open for the franchiser to choose a particular franchisee over another without attributing any specific reasons.

13. Following points were also submitted:

(a) ICANN does not recognize its receipts as franchise income;

(b) The appellants do not recognize the expense as franchise expense;

(c) Neither ICANN's nor the appellants website refers to either the appellant as a franchiser or franchisee;

(d) The invoice raised by ICANN does not refer to franchise;

(e) The invoice raised by the appellant to the customer neither contains any reference to a franchise arrangement nor to any brands or name of ICANN.

14. It was also submitted that even ICANN has issued letter confirming that the appellant is not a franchisee and no representational rights have been granted to the appellant. It was submitted that the appellant has not surrendered his own identity. It conducts business under its own brand name and does not step into the shoes of ICANN. The customer is aware it is approaching the appellant and does not identify the appellant as ICANN.

15. Following case law were also quoted in support of the contention:

(a) Global Transgene Ltd vs CCE, Aurangabad;

(b) New Mangalore Port Trust Ltd vs CST 2012 (26) STR 155 (Tr -Bang) ;

(c) Amway India Enterprises Pvt Ltd vs CCE, New Delhi -2013 (31) STR 551 ;

(d) Franch Express Network (P) Ltd vs CST, Chennai -2008 (12) STR 370 (Tri-Chennai) .

16. It was contended that in view of the above, the demand of Service tax on all remittance made to ICANN is incorrect and should be dropped.

17. The other contention of the advocate for the appellant was that registries are not associate franchisor of ICANN. It was contended that the demand in the present case is raised on remittance made by the appellant to registries located abroad by treating the said registries as associate franchisor. The very fact that ICANN is not a franchisor, it cannot be held the registry is an associate franchisor. Both registry and registrar are independent entity operated on principal to principal basis and the rational contended earlier are equally applicable in the present case also.

18. The next contention was that the appellant is also not an associate franchisor of ICANN as alleged in the second Show Cause Notice and is not rendering franchise service to reseller. It was submitted that neither any representation right is granted to the appellant by ICANN, nor the appellant grants any representational right to resellers. It would be anomalous to state that the appellant is both franchisor and franchisee at the same time. It was also submitted that reseller agreement entered into by the appellant and its reseller explicitly prohibited the reseller from displaying the ICANN and ICANN accredited registrar logo.

19. In addition to the above contentions on merits it was submitted that part of the demand is for the period prior to April 18, 2006 and as held by the Hon'ble Bombay High Court in *Indian National Ship Owners Association vs Union of India - 2009 (13) STR 235 (Bom)*, The demands are not sustainable in respect of import of services.

20. It was also contended that even if it is assumed that service tax is payable by the appellant, still no service tax can be demanded on the portion of services which qualified as export of services in terms of the Export of Services Rules, 2005. It was submitted that out of the total output turnover of Rs.4,73,86,19,240/- only Rs.88,39,16,786/- is towards the domestic sales and all the remaining sales are made to the resellers located outside India and the amount was received in convertible foreign exchange and all other conditions under Export of Service Rules, 2005 are duly fulfilled.

21. It was also submitted that assuming that the services provided by ICANN and registries are taxable, the service provided are outside India. When registries and ICANN provide such alleged services, the benefit of such services directly flow to the resellers of appellant outside India and therefore such services are never received in India and in terms of Import Rules the services should be received in India and since such services are not received in India, no service tax can be levied in India. It was also contended that the benefit of Cenvat Credit should be given to the appellant. Similarly if at all its activities are held as taxable then cum-duty benefit is required to be given. It was also contended that the value of services should only be restricted to yearly accreditation fees. It was submitted that even if the arrangement is franchise only accreditation fee payable to ICANN can be taxed under the franchise services. The invoices between a registry and the appellant shows the fees paid by the appellant to the registry are categorized as new registration and renewal fees. This amount to fees paid for actual goods and services and not towards franchise fees. It was also submitted that all customers of the appellant are not resellers; some of them are end users and the demand has been made for the total amount and fees from customers who are end users cannot be considered as franchisee of the appellant. It was also submitted that certain domain name registries such as uk , au etc did not have any accreditation or agreement with ICANN and such registries by no stretch of imagination can be called as associate franchisor of ICANN. Remittances made to such registries have also been included in the taxable value. It was also contended that the extended period of limitation cannot be invoked and in support of the said contention, the Hon'ble Supreme Court's decision in the case of *Uniworth Textiles Ltd vs CCE, Raipur -2013 (288) ELT 161 (SC) and Nizam Sugar Sugar Factory vs CCE, A.P. - 2006 (197) ELT 465 (SC)* were relied upon.

22. It was further submitted that ICANN is a not for profit organization performing a regulatory function of controlling the domain names and does not provide any service to the registrars and therefore can by no stretch of imagination can be called as a franchisor. It

was also submitted that in the facts and circumstances of the case no penalty under Sections 76, 77 and 78 of the Finance act, 1994 can be imposed.

23. The learned special counsel for the Revenue submitted that the Hon'ble Supreme court in the case of *Satyam Infoway Ltd vs Sifynet Solutions Pvt Ltd reported in AIR 2004 SC 3540* has observed that the original role of a domain name was no doubt to provide an address for computers on the internet. But the internet has developed from a mere means of communication to a mode of carrying on commercial activity and therefore the domain name not only serves as an address for internet communication but also identifies the specific internet site. In the commercial field, each domain name owner provides information/services which are associated with such domain name and thus a domain name may pertain to provision of services within the meaning of Section 2 (z) of the Trade Marks Act, 1999. The law enunciated in this regard is that the domain names are subject to the legal norms applicable to other intellectual properties such as trade marks .

24. The learned special counsel for the Revenue thereafter took us through the agreement between ICANN and the appellant. The said agreement is called the Registrar Accreditation Agreement (RAA). The appellant is registrar as per Clause 1.9 and as per clause 1.110 "Registrar Services" means services provided by a registrar in connection with a TLD as to which it has been an agreement with TLD's registry operators and includes contracting with registered name holders, collecting information about such entities and submitting the same for entry in the registry database. As per clause 2.2, ICANN grants to registrar (appellant), a non-exclusive, worldwide royalty-free licence - (a) to state that it is accredited by ICANN as a registrar for each TLD; and (b) to link to pages and documents within the ICANN website. As per clause 3.1 the appellant will operate as a registrar for each TLD for which it is accredited by ICANN. Clause 3 lays down various Registrar Obligations and as per clause 3.3.6 appellant shall provide third-party bulk access to the data subject to public access for which registrar may charge an annual fee not to exceed US\$ 10,000 for such bulk access. In the Logo licence Appendix it is stipulated that ICANN grants to registrar a non-exclusive worldwide right and license to use the trademarks solely in connection with the provision and marketing of registrar services; however all rights to the trademarks that may be acquired by the registrar (appellant in this case) shall inure to the benefit of and assigned to ICANN and registrar shall not assert ownership of the trademarks or any associated goodwill and registrar shall not sub license any of its rights to anybody including re-sellers without prior written approval of ICANN.

25. The second agreement i.e. between the appellant and the registry was gone through. The said agreement is between VeriSingn, a Delaware Corporation and its subsidiaries (VNDS) and the appellant. ICANN figures in clause 1.2 of this Agreement. As per clause 1.8 the licensed product refers to the intellectual property required to access the supported protocol, and to the application programme interfaces a software collectively. As per clause 2.5, Registrar grants VNDS as Registry a non-exclusive, non-transferable worldwide limited license to the data elements consisting of registered name, IP addresses of name servers and identity of registering registrar for propagation and provision of authorized access to TLD Zone files permitted or required by VNDS Registry. As per clause 3.1 VNDS grants registrar a non-exclusive worldwide limited license to use the licensed product. As per clause 4 there are various support services like engineering support and customer service support. Clause 5 provides for registration fee payable by registrar to VNDS, non-refundable fees and monthly registration fees on the basis of monthly invoices. For a transfer approved by ICANN registrar agrees to pay VNDS US\$ 0 for transport upto 50,000 names or US\$ 50,000 for more than 50,000 names. There are also provisions for payment of fees by registrar to VNDS and variable registry level fees paid by VNDS to ICANN.

26. The third agreement is Reseller Master Agreement which was gone through is between appellant and the reseller. In this agreement appellant are the parent providing various products and services and the re-seller buying/receiving various "parent products" and "parent services". There are parent servers and parent website. Clause 1 (25) gives the definition of and reference to ICANN. Even in the Re-seller Domain Registration Product Agreement Extension, in clause 1 (4) there is a reference to ICANN. From the definition of

obligations of re-seller and rights of parent, the important and indispensable role of ICANN is discernible. Appendix B lays down the list of Top Level Domains that the parent is authorized to provide domain name registration and management services. Thus the reseller is obligated to get domain name registration and management services of .com, .net, org, biz, .info though the parent registrar Directi Internet Solutions Pvt Ltd who in turn are duly authorized by ICANN to provide such registration and management services.

27. The learned special counsel submitted that from the three agreements, it is clear that the services received/provided by the appellant satisfied the definition of franchisee. It was also submitted that the argument that ICANN is not engaged in domain registration and hence appellant doing registration of domain names does not represent ICANN is fallacious as the domain names are assigned by ICANN and logo, or trade mark of ICANN is allowed to be used by appellant though the ownership of logo or trade mark continues with ICANN. ICANN is present in all the three types of agreements and every user of the domain name assigned to appellant knows that the owner of the domain name is ICANN. It was submitted that seeming difference is attributable to the difference between a tangible consumer product and an intangible service of registration and management of domain names. It was also submitted by the learned special counsel for the Revenue that the argument that ICANN is performing a regulatory function and its job is not commerce and profit is of no consequence as ICANN receives fees which are both fixed and variable. Similarly fee is received by the appellant, registry as also reseller. If a regulator registry is engaged in trade and commerce it has to pay the taxes. The learned special counsel also quoted this Tribunal decision in *Delhi Public School Society vs CST, New Delhi - 2013 (32) STR 179 (Tri-Del)* where it is clearly ruled that despite a claimed education joint venture agreement (without any mention of franchise, franchisor or franchisee), the dominant component of enterprise was franchise service and despite a temporal transfer of intangible property and permitting the other party to use the logo, the service is not intellectual property service but franchise service by virtue of a raft and bouquet of other services. It was therefore contended that the ratio of the above decision squarely applies to the facts of the present case.

28. It was also submitted that the appellant's other arguments, benefit of export services, Cenvat credit, cum-duty benefit, restriction of value of service to annual accreditation fees are fallacious and cannot be accepted. In any case, they could have put forward such claims after owning up their liability to pay tax on franchise service.

29. It was also submitted that the extended period has been correctly invoked as the appellant has suppressed this service in their ST 3 Returns despite Service Tax registration for other two services and their intimate knowledge of Service Tax law.

30. It was also contended that interest has been correctly demanded and penalty has been rightly imposed.

31. We have considered the rival submissions. We find that demand notices have been issued under the Franchise Service. The terms "Franchisee" and "Franchisor" have been defined under Section 65 (47) and 65 (48) of the Finance Act, 1994 and at the relevant time are as under:

"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."

32. It would thus be seen from the above mentioned definitions that franchisee means an agreement by which the franchisee is granted representational rights to sell or manufacture goods or to provide service or undertake any process identified with franchisor. The Revenue's case is that franchisor in the present case is ICANN and the appellants are franchisee. In order to examine whether the appellants are a franchisee, we examine activities of ICANN and thereafter the agreement between ICANN and the appellants. The appellants have provided a copy of the ICANN Byelaws. Article I of the said byelaws details the "Mission and Core Values" of ICANN which are reproduced below:

Article I: MISSION AND CORE VALUES

Section 1. MISSION

The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:

1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are

a. Domain names (forming a system referred to as "DNS");

b. Internet protocol ("IP") addresses and autonomous system ("AS") numbers: and

c. Protocol port and parameter numbers.

2. Coordinates the operation and evolution of the DNS root name server system.

3. Coordinates policy development reasonably and appropriately related to these technical functions.

Section 2. CORE VALUES

In performing its mission, the following core values should guide the decisions and actions of ICANN:

1 Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.

2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.

3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.

4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.

5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.

6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

Source- www.taxguru.in

7. *Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.*

8. *Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*

9. *Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.*

10. *Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.*

11. *While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.*

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

33. Article II of the said byelaws details the "Powers". Section 2 of the Article II details restriction and the said Section 2 reads as under:

Section 2. RESTRICTIONS

ICANN shall not act as a Domain Name System Registry or Registrar or Internet Protocol Address Registry in competition with entities affected by the policies of ICANN. Nothing in this Section is intended to prevent ICANN from taking whatever steps are necessary to protect the operational stability of the Internet in the event of financial failure of a Registry or Registrar or other emergency.

33.1 Now coming to the ICANN, there is an agreement between the appellants and the ICANN known as "Registrar Accreditation Agreement". We have perused a copy of the said Agreement. The clause 1.1 defines the term "Accredit" and other relevant clauses mentioned by the learned Special Counsel for Revenue are clauses 1.9 and 1.11. These clauses are reproduced below:

"Accredit" means to identify and set minimum standards for the performance of registration functions, to recognize persons or entities meeting those standards, and to enter into an accreditation agreement that sets forth the rules and procedures applicable to the provision of Registrar Services.

1.9 *The word "Registrar," when appearing with an initial capital letter, refers to Direct Internet Solutions d/b/a PublicDomainRegistry.com, a party to this Agreement.*

1.11 *"Registrar Services" means services provided by a registrar in connection with a TLD as to which it has an agreement with the TLD's Registry Operator, and includes contracting with Registered Name Holders, collecting registration data about the*

Registered Name Holders, and submitting registration information for entry in the Registry Database.

33.2 The other clauses referred by the learned Special Counsel for the Revenue are clauses 2.2 and 3.1. These two sub-clauses are also reproduced below:

2.2 Registrar Use of ICANN Name and Website . ICANN hereby grants to Registrar a non-exclusive, worldwide, royalty-free license during the Term of this Agreement (a) to state that it is accredited by ICANN as a registrar for each TLD that is the subject of an appendix to this Agreement and (b) to link to pages and documents within the ICANN web site. No other use of ICANN's name or website is licensed hereby. This license may not be assigned or sublicensed by Registrar.

3.1 Obligations to Provide Registrar Services . During the Term of this Agreement, Registrar agrees that it will operate as a registrar for each TLD for which it is accredited by ICANN in accordance with this Agreement.

33.3 Another sub-clause referred by the learned Special Counsel is 3.3.6, same is reproduced below:

3.3.6 In addition, Registrar shall provide third-party bulk access to the data subject to public access under sub-section 3.3.1 under the following terms and conditions:

3.3.6.1 Registrar shall make a complete electronic copy of the data available at least one time per week for download by third parties who have entered into a bulk access agreement with Registrar.

3.3.6.2 Registrar may charge an annual fee, not to exceed \$10,000, for such bulk access to the data.

3.3.6.3 Registrar's access agreement shall require the third party to agree not to use the data to allow, enable, or otherwise support the transmission by e-mail, telephone, or facsimile of mass, unsolicited, commercial advertising or solicitations to entities other than such third party's own existing customers.

3.3.6.4 Registrar's access agreement may require the third party to agree not to use the data to enable high-volume, automated, electronic processes that send queries or data to the systems of any Registry Operator or ICANN- Accredited registrar, except as reasonably necessary to register domain names or modify existing registrations.

3.3.6.5 Registrar's access agreement may require the third party to agree not to sell or redistribute the data except insofar as it has been incorporated by the third party into a value-added product or service that does not permit the extraction of a substantial portion of the bulk data from the value-added product or service for use by other parties.

3.3.6.6 Registrar may enable Registered Name Holders who are individuals to elect not to have Personal Data concerning their registrations available for bulk access for marketing purposes based on Registrar's "Opt-Out" policy, and if Registrar has such a policy. Registrar shall require the third party to abide by the terms of that Opt-Out policy; provided, however, that Registrar may not use such data subject to opt-out for marketing purposes in its own value-added product or service.

34. Another important part of the agreement referred by the Special Counsel is "LOGO LICENSE APPENDIX'. The relevant part is reproduced below:

REGISTRATION AND ENFORCEMENT

Source- www.taxguru.in

Registrar wishes to acquire from ICANN, and ICANN wishes to grant to Registrar, a license to use the trademarks listed below the signature block of this Logo License Appendix ("Trademarks") in connection with Registrar's role as an ICANN-accredited registrar. Pursuant to and subject to the Registrar Accreditation Agreement, Registrar and ICANN hereby agree as follows:

LICENSE

1. *Grant of License.* ICANN grants to Registrar a non-exclusive, worldwide right and license to use the Trademarks, during the term of this appendix and solely in connection with the provision and marketing of Registrar Services in order to indicate that Registrar is accredited as a registrar of domain names by ICANN. Except as provided in this sub-section and Sub-section 2.2 of the Registrar Accreditation Agreement, Registrar shall not use the Trademarks, any term, phrase, or design which is confusingly similar to the Trademarks or any portion of the Trademarks in any manner whatsoever.

2. *Ownership of Trademarks.* Any and all rights in the Trademarks that may be acquired by Registrar shall inure to the benefit of, and hereby assigned to, ICANN. Registrar shall not assert ownership of the Trademarks or any associated goodwill.

3. *No Sublicense.* Registrar shall not sublicense any of its rights under this appendix to any other person or entity (including any of Registrar's resellers) without the prior written approval of ICANN.

REGISTRATION AND ENFORCEMENT

1. *Registration.* Registration and any other form of protection for the Trademarks shall only be obtained by ICANN in its name and at its expense.

2. *Enforcement.* Registrar shall promptly notify ICANN of any actual or suspected infringement of the Trademarks by third parties, including Registrar's resellers or affiliates. ICANN shall have the sole discretion to initiate and maintain any legal proceedings against such third parties; Registrar shall not take any such actions without the prior written approval of ICANN; and ICANN shall retain any and all recoveries from such actions.

3. *Further Assurances.* Registrar agrees to execute such other documents and to take all such actions as ICANN may request to effect the terms of this appendix, including providing such materials (for example URLs and samples of any promotional materials bearing the Trademarks), cooperation, and assistance as may be reasonably required to assist ICANN in obtaining, maintaining, and enforcing trademark registration(s) and any other form of protection for the Trademarks.

TERM AND TERMINATION

This Logo License Appendix shall be effective from the date it is signed below by both parties until the Expiration Date, unless this appendix or the Registrar Accreditation Agreement is earlier terminated. Each party shall have the right to terminate this appendix at any time by giving the other party written notice. Upon expiration or termination of this appendix, Registrar shall immediately discontinue all use of the Trademarks.

35. It would be seen from the above mentioned sub-clauses, ICANN Accredits the appellant after identifying and setting minimum standards for the purpose of registration functions. Further, Clause 2.2 permits the appellant to use a symbol which indicates that ICANN has accredited the appellant. We have also gone through and seen the said symbol which is reproduced below:

Source- www.taxguru.in



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.

37. Coming to the second agreement. That agreement is between the Registry and Registrar, the learned Special Counsel referred to Clause 1.8, 2.5, 3.1 , 4 and 5 of the said Agreement viz between VNDS (Registry) and appellant/register). The said clauses are reproduced below for ready reference:

1.8. The "Licensed Product" refers to the intellectual property required to access the Supported Protocol, and to the APIs, and software, collectively.

2.5. License. Registrar grants VNDS as Registry a non-exclusive non-transferable worldwide limited license to the data elements consisting of the Registered Name, the IP addresses of name servers, and the identity of the registering registrar for propagation of and the provision of authorized access to the TLD zone files or as otherwise required or permitted by VNDS's Registry Agreement with ICANN concerning the operation of the Registry TLD, as may be amended from time to time.

3.1. License Grant. Subject to the terms and conditions of this Agreement, VNDS hereby grants Registrar and Registrar accepts a non-exclusive, non-transferable,

Source- www.taxguru.in

worldwide limited license to use for the Term and purposes of this Agreement the Licensed Product, as well as updates and redesigns thereof, to provide domain name registration services in the Registry TLD only and for no other purpose. The Licensed Product, as well as updates and redesigns thereof, will enable Registrar to register domain names in the Registry TLD with the Registry on behalf of its Registered Name Holders. Registrar, using the Licensed Product, as well as updates and redesigns thereof, will be able to invoke the following operations on the System: (i) check the availability of a domain name, (ii) register a domain name, (iii) re-register a domain name, (iv) cancel the registration of a domain name it has registered, (v) update the name servers of a domain name, (vi) transfer a domain name from another registrar to itself with proper authorization, (vii) query a domain name registration record, (viii) register a name server, (ix) update the IP addresses of a name server, (x) delete a name server, (xi) query a name server, and (xii) establish and end an authenticated session.

4. SUPPORT SERVICES

4.1. *Engineering Support.* VNDS agrees to provide Registrar with reasonable engineering telephone support (between the hours of 9 a.m. to 5 p.m. EST or at such other times as may be mutually agreed upon) to address engineering issues arising in connection with Registrar's use of the System.

4.2 *Customer Service Support.* During the Term of this Agreement, VNDS will provide reasonable telephone and e-mail customer service support to Registrar, not Registered Name Holder or prospective customers of Registrar, for non-technical issues solely relating to the System and its operation. VNDS will provide Registrar with a telephone number and e-mail address for such support during implementation of the Supported Protocol, APIs and Software. First-level telephone support will be available on a 7-day/24-hour basis. VNDS will provide a web-based customer service capability in the future and such web-based support will become the primary method of customer service support to Registrar at such time.

5.1. Registration Fees.

(a) Registrar agrees to pay VNDS the non-refundable fees set forth in Exhibit D for initial and renewal registrations and other services provided by VNDS (collectively, the "Registration Fees").

(b) VNDS reserves the right to adjust the Registration Fees, provided that any price increase shall be made only upon six (6) months prior notice to Registrar, and provided that such adjustments are consistent with VNDS's Registry Agreement with ICANN.

(c) Registrars shall provide VNDS a payment security comprised of an irrevocable letter of credit, cash deposit account or other acceptable credit terms agreed by the Parties (the "Payment Security"). VNDS will invoice Registrar monthly in arrears for each month's Registration Fees. All Registration Fees are due immediately upon receipt of VNDS's invoice and shall be secured by the Payment Security. If Registrar's Payment Security is depleted, registration of domain names the Registrar will be suspended and new registrations will not be accepted until the Payment Security is replenished.

38. It has been alleged in the demand notice that the registries are associate franchisor (of ICANN) and therefore the agreement between the associate franchisor and the appellant is a franchisee agreement. It is presumed that the registries are franchisees of the ICANN.

39. We find that agreement between ICANN and Registry has not been produced either by Revenue or the appellant. We find that Revenue have not been able to bring on record any

service or process identified with ICANN which is required to be provided by various registries accredited by ICANN. It appears that registries are also accredited like registrars. ICANN might have provided minimum standards for registries but that does not imply that registries are providing any service or process identified with ICANN. A reading of the above mentioned agreement clearly indicates that this is an agreement between registry and the appellant and has nothing to do with ICANN and under the circumstances we are not able to persuade ourselves that the appellants are providing franchise service of the associate franchisor of ICANN (i.e. registries).

40. Coming to the second Show Cause Notice, which is between the appellant and reseller, the appellant have appointed a large number of resellers all throughout the world who are required to sell the products and services of the appellants.

41. We have gone through the said Reseller Master Agreement as also the Reseller Domain Registration Product Agreement Extension. Clause 1 (25) and 1 (4) in these are as under:

"1 (25) "ICANN" is the Internet Corporation for Assigned Names and Numbers.

1 (4) "ICANN" is the Internet Corporation for Assigned Names and Numbers."

42. First of all, we observe that the resellers are specifically prohibited from using the name of ICANN. They only represent the appellant. In fact they are reselling the services of registrar being provided by the appellant. After selling the services of the registrar they remit the money to the appellant as per the agreement. We find that the agreement is of a nature of principal to principal basis and resellers cannot be considered as franchisee or associate franchisor of ICANN.

43. In fact, we have already held earlier that appellant cannot be considered as a franchisee of ICANN and therefore resellers cannot be considered as franchisee of the associate franchisor. In view of above position, in our view the Revenue's contention that the resellers are providing the franchisee services of the ICANN does not hold water. In view of the above analysis we do not find any strength in the second demand notices also. Accordingly we hold no service tax is leviable under the franchise service and hence demand and penalties are not sustainable.

44. We also note that the appellant has raised certain other arguments. However, since we are allowing the appeal on the merits, we do not consider it necessary to go into other aspects.

45. The appeal is accordingly allowed.

(Pronounced in Court on 5.8.2014.)