

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 11505 of 2013-DB

[Arising out of Order-in-Original/Appeal No SRP-09-10-VAPI-2013-14 dated 02.04.2013 passed by Commissioner of Central Excise, Customs and Service Tax-VAPI]

ITW India Limited

.... Appellant

Survey No. 263, Village : Surangi,
SILVASSA, U T OF DADRA & NAGAR HAVELI-396240

VERSUS

Commissioner of Central Excise & ST, Vapi

.... Respondent

4th Floor, Adharsh Dham Building, Opp. Town Police
Station, Vapi-Daman Road, Vapi, Gujarat-396191

AND

SERVICE TAX Appeal No. 12328 of 2013-DB

[Arising out of Order-in-Original/Appeal No SRP-09-10-VAPI-2013-14 dated 02.04.2013 passed by Commissioner of Central Excise, Customs and Service Tax-VAPI]

Hemal Zaveri

.... Appellant

Senior Manager, Accounts
Survey No. 263, Village : Surangi,
SILVASSA, U T OF DADRA & NAGAR HAVELI-396240

VERSUS

Commissioner of Central Excise & ST, Vapi

.... Respondent

4th Floor, Adharsh Dham Building, Opp. Town Police
Station, Vapi-Daman Road, Vapi, Gujarat-396191

APPEARANCE :

Shri Jigar Shah, Advocate for the Appellant
Shri Rajesh K Agarwal, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

DATE OF HEARING : 01.06.2023

DATE OF DECISION: 29.08.2023

FINAL ORDER NO. 11815-11816/2023

C.L. MAHAR :

The brief facts of the case are that during audit of the appellant's statutory records, financial ledger etc., the Revenue's audit team noticed that appellant have raised debit notes to its various distributors and collected amount in the name of royalty from them. It was also noticed by the Revenue that appellant have entered into agreement with all its

distributors whereunder the appellant have charged "exclusivity charges" for granting rights of distribution and sale of its products. A view therefore was entertained by the Revenue that the appellant is providing franchisee service and same is chargeable to service tax vide sub-clause (zze) of Clause 105 of Section 65 of the Finance Act, 1994. The department issued impugned show cause notice dated 12.05.2011 whereunder the service tax of Rs. 20,43,893/- has been demanded under Section 73(1) of Finance Act, 1994 for providing franchisee service to its various dealers. Penal provisions under Section 76, 77 and 78 of the Finance Act, 1994 has also been invoked.

2. Shri Hemal Zaveri, Senior Manager Accounts of M/s. Itw India Limited has also been made liable for penal action under Section 76 of the Finance Act, 1994.

3. The matter has been adjudicated vide impugned order-in-original dated 17.05.2012 whereunder all the charges leveled in the show cause notice have been confirmed by the Adjudicating Authority and penalty of Rs. 10,000/- has also been imposed on Shri Hemal Zaveri under Section 77(2) of the Finance Act, 1994. The appellant have challenged the impugned order-in-original before Commissioner (Appeals) who vide his order dated 02.04.2013 has upheld the findings given in the impugned order-in-original except that he has allowed benefit of cum-tax value in terms of Section 67(2) of the Finance Act, 1994. The appellants are before us against the above mentioned order-in-appeal.

4. Learned Advocate appearing for the appellant have contested that the show cause notice as well as the impugned orders have not appreciated the facts of the matter in a proper way. It has been the contention of the learned advocate that there is no "franchisee and franchisor" relationship in the facts and circumstances of this case. The learned advocate has taken us through the definition of franchisee and franchisor, which is reproduced below:-

The definitions of "franchise" and "franchisor" under section 65 (47) & (48) of the Act with effect from 16th June, 2005:

(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 log or any such symbol, as the case may be, is Involved"

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

It has been the contention of the learned advocate that only a person having representational rights to sale or manufacture goods are liable to service tax under the franchisee service. Therefore, the service tax is on the person having the right to sale and not on the franchisor. The essential ingredients required for possibility of franchisee service under sub-clause (zze) of clause 105 of Section 65 of the Finance Act, 1994 are that :-

- (i) the services are provided or are to be provided by a franchisor in relation to franchisee, and
- (ii) the service must be provided by the franchisors.

5. It has been pointed out that appellant do not provide any 'franchisee' to its distributors and therefore, no franchisee service has been provided here. Learned advocate has taken us through the contents of the agreement signed between the appellant with its various distributors. It has been submitted that distributors approached the appellant for setting up retail distribution net-work in their territory of the product manufactured by the appellant, as they have extensive knowledge and experience and relationship with the buyers in their territory. It is vehemently argued by the learned advocate that appellant has not given any representational rights to its distributors. The agreement which have been entered into by the appellant with these distributors is purely of purchase and sale and no element of transfer of representation rights is involved in this deal.

6. With regards to the "Exclusivity Fee" recovered by them from their distributors, it has been submitted that "Exclusivity Fee" is refundable amount and in the event of early termination of the agreement due to any reason, the appellant are duty bound to refund "Exclusivity Fee" on pro-rata basis for the unexpired period to the distributor. The learned advocate has given an example that as, if the distributor has agreement for 5 years and the agreement gets terminated after two years and one month, the period reckoned is two years and six months and the distributor will be entitled for refund of "Exclusivity Fee" on pro-rata basis for two years and six months.

7. In sum and substance, it has been the contention of the learned advocate that the relationship between the appellant and its distributors is that the distributors are wholesale buyers of their product and they further distribute and sale their goods in the market and no representational right has been provided to distributors by the appellant and therefore, it is wrong on the part of the department to demand any service tax under the franchisee service under sub-clause (zze) (105) of Section 65 of Finance Act, 1994.

8. Learned advocate has relied upon CBIC Circular dated 27.07.2005, the relevant portion of the Circular is reproduced hereunder:-

Letter F.No. B1/6/2005-TRU, dated 27-7-2005

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject : Budget 2005-2006, Issues pertaining to Service tax.

In the Budget for 2005-2006, proposals were incorporated to levy service tax on nine new services and to expand the scope of twelve existing taxable services [refer clauses (a) and (b) of section 88 of the Finance Act, 2005]. Certain other important legislative changes have also been made relating to, -

- (a) taxable services received from abroad;
- (b) linking payment of service tax with receipt of payment for the taxable services provided or to be provided; and
- (c) issue of show cause notices and adjudication.

The Finance Act, 2005 (hereinafter referred as the Finance 2. Act) has come into force with effect from 13th May, 2005. Provisions relating to levy of service tax on new services and proposed expansion in the scope of existing services made by amending sections 65 and 66 of the Finance Act, 1994 have been made effective from 16th June, 2005 (refer notification No. 15/2005-Service Tax, dated 7-6-2005). Certain other amendments relating to service tax in the Finance Act, 1994 are effective from the date of enactment of the Finance Act.

The scope of these changes is explained in the following 3. paragraphs.

4. New services

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23. Franchise Service

Prior to 16-6-2005, franchise services were liable to 23.1 service tax only when the agreement between the franchisor and the franchisee satisfies **all** of the following conditions [as mentioned in section 65(47)] :

- (i) Franchisor grants representational right to franchisee to sell or manufacture goods or provide service identified with the franchisor;

(ii) Franchisor provides expertise in business operation, know how, quality control etc. to the franchisee;

(iii) Franchisee pays fees to the franchisor;

(iv) The franchisee is under an obligation not to engage in selling goods or providing services identified with any other person.

23.2 To make the coverage of franchise service more comprehensive, effective from 16-6-2005, amendments have been made to define "franchise" as an agreement by which the franchisor grants representational rights to franchisee to sell or manufacture goods or provide service or undertake any process identified with the franchisor, by any symbol such as a trade mark, service mark, trade name or logo. No other condition is required to be fulfilled for levy of service tax.

23.3 In view of the amended definition, License Production Agreements where principal allows production of goods bearing his brand name by another person would be covered under the purview of service tax under this category. 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. Details of franchisees may be obtained from Yellow Pages, website <http://franchiseindia.com/> and other advertisements. Field formations may undertake a survey and suitably advise the potential tax payers.

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The learned advocate has also relied upon following case laws in their support:-

(A) Delhi International Airport P. Limited vs. UOI - 2017 (2) TMI-775-Delhi High Court

(B) Tata Consultancy Service Limited vs. CCE - 2019 (6) TMI-109-CESTAT-MUM

(C) Siti Cable Network Limited vs. CST - 2020 (8) TMI-79-CESTAT-NEW DELHI

(D) Rackitt Benckiser (India) Limited vs. CCE - 2020 (7) TMI-384-CESTAT-CHANDIGARH

(E) Global Transgene Limited vs. CCE - 2013 (8) TMI 748-CESTAT MUMBAI

(F) Manipal Universal Learning Pvt. Limited vs. CCE - 2019 (12) TMI-943-CESTAT-BANGALORE

9. We have also heard Shri Rajesh K Agarwal, learned Superintendent (DR) who has reiterated the findings given in the impugned order-in-original.

10. Having heard both the sides and perused the record of the Appeals. We feel that before proceedings further in the matter it will be relevant to have a look at the definition of the Franchisee and Franchisor given in the Finance Act, 1994:-

“Section 65 (47) of the Finance Act, 1994:-

“Franchise” means an agreement by which -

(i) 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 of logo or any such symbol, as the case may be, is involved

(ii) the franchisor provides concepts of business operation to franchise, including know-how, method of operation managerial expertise, marketing technique or training and standards of quality control except passing on the ownership of all know-how to franchisee;”

Similarly Section 65 (48) also give definition of franchisor which is reproduced herein below:-

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

10.1 The department after amendment to the definition of the ‘franchisee’ service with effect from 16.06.2005 has clarified the matter vide their Circular No. B-1/6/2005-TRU dated 27.07.2005 wherein the franchisee service has been explained by the CBEC. The relevant extract of the above mentioned Circular is reproduced below:-

“23. Franchise Service

Prior to 16-6-2005, franchise services were liable to 23.1 service tax only when the agreement between the franchisor and the franchisee satisfies **all** of the following conditions [as mentioned in section 65(47)] :

- (i) Franchisor grants representational right to franchisee to sell or manufacture goods or provide service identified with the franchisor;
- (ii) Franchisor provides expertise in business operation, know how, quality control etc. to the franchisee;
- (iii) Franchisee pays fees to the franchisor;
- (iv) The franchisee is under an obligation not to engage in selling goods or providing services identified with any other person.

23.2 To make the coverage of franchise service more comprehensive, effective from 16-6-2005, amendments have been made to define "franchise" as an agreement by which the franchisor grants representational rights to franchisee to sell or manufacture goods or provide service or undertake any process identified with the franchisor, by any symbol such as a trade mark, service mark, trade name or logo. No other condition is required to be fulfilled for levy of service tax.

23.3 In view of the amended definition, License Production Agreements where principal allows production of goods bearing his brand name by another person would be covered under the purview of service tax under this category. 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. Details of franchisees may be obtained from Yellow Pages, website <http://franchiseindia.com/> and other advertisements. Field formations may undertake a survey and suitably advise the potential tax payers."

10.2 From the above explanation provided by the Circular (supra), it can be seen that merely because by an agreement a right is confirmed on the party to sale of goods or service undertaken was not *ipso-facto* bringing the agreement within the ambit of franchisee. What is essentially required is to establish that as per the agreement the rights has not conferred on franchisee which amount to representational rights. To our understanding, the representational right would mean that for all practical purposes the franchisee losses its own identity and acquire with that of the franchisor. Before proceedings further in the matter it would be relevant to refer to the relevant clauses of the distributor agreement:-

WHEREAS:

A. ITW is engaged in the manufacture and sale of Industrial Consumable./ Equipment and, inter alia, has expertise and know-how in Steel Packaging, Industrial Packaging and special chemical packaging and wide range of other products and services including Operating and maintenance, Equipment Servicing and development of specialized and custom built solutions

B. ITW intends to establish a countrywide network throughout India and intends to appoint DISTRIBUTOR to market, promote and distribute the Products in such parts of India.

C. The DISTRIBUTOR has represented to ITW that it has the requisite funds and the infrastructure for taking up the promotion of sale of the Products and the knowledge/ experience of the market and distribution in its area of operation in India and has shown willingness to renew the contract and continue to act as the DISTRIBUTOR of ITW and has agreed to assist ITW in setting up and managing its retail distribution network and infrastructure for the Territory, leveraging its extensive knowledge, experience and relationship in the Territory.

D. ITW has agreed to renew the agreement with S V Packaging Agencies, as its Distributor and S V Packaging Agencies, has agreed to promote the sale of the Products in the Territory on the terms and conditions hereinafter appearing.

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6. DISTRIBUTOR'S RESPONSIBILITIES : distributor be responsible for, operating its business as a distributor, including for the provisions enumerated in the standard

procedure (as amended from time to time by ITW), specifically the following, the costs of which shall be borne by the distributor; unless the contrary is expressly stated herein:

- (i) To use its distribution network for the purposes of this agreement, in the territory.
- (ii) To provide sufficient and suitable space for stocking the products, including refurbishment, partitions, air conditioning, communication, equipment, etc. For running of the Distributorship.
- (iii) To provide requisite amount of dedicated and trained sales and service personnel and office staff as per ITW's requirement. Distributor agrees to change any of the above personnel, if ITW so deems it fit. ITW will train the above personnel, as required, on an ongoing basis. All such training shall be at the expense of the distributor other than the new product launch training and technology training provided by ITW for which the costs shall be borne by ITW.

To:

- (a) Exploit the full sales potential of the territory by ensuring that targeted sales, as specified by ITW, are achieved; and
- (b) Assist ITW for all sales and promotional activities.
- (v) To conduct its operations in a manner that shall consistently promote and uphold the high image, credibility, and reputation of ITW and the products and shall not act in any manner or make any statements that would be detrimental to them. Distributor shall not issue any press releases or otherwise give any statements / interviews to the media, without first clearing the text for the same in writing by ITW.
- (vi) To clear, collect, unload, store all consignments of the products at its own cost and store them under proper security. Distributor shall take all necessary actions/ precautions to prevent theft, fraud, misuse or total destruction from fire, accident or other natural disasters of the products and ITW property.
- (vii) To take delivery of the products dispatched to it promptly and avoid demurrage and other such charges. In the event of any such damages or any other costs being incurred due to its failure to take delivery in time, the same will be borne and paid by the distributor.
- (viii) To maintain minimum stocks of value equivalent to the value of the products the distributor has sold in immediately preceding 3 weeks to ensure timely delivery of the products.

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8. ITW'S RIGHTS:

- (i) ITW shall, at its discretion, assign monthly/quarterly/annual targets to the Distributors.
- (ii) ITW shall be entitled to take action against the distributor in the event it fails to comply with any terms of this agreement or the norms of the standard procedure of ITW. The distributor undertakes not to dispute any resultant action taken by ITW, which shall be final and binding on the distributor and/or its employees/agents.

(iii) ITW shall not, under any circumstances, entertain any complain against any product, if made after the expiry of 7 days from the date of its sale.

9. DISTRIBUTOR'S COVENANTS:

(i) Distributor agrees and undertakes that it shall not make an representation or give any warranty in respect of the products other than those contained in ITW's conditions of sale as current at the time of the offering for sale or the sale itself.

(ii) Distributor agrees and understands it shall have no right of action against ITW in respect of any loss incurred by it by reason of an delay in delivery occasioned by shortage of stock or delays in transit delays caused by accidents or strikes

(iii) Distributor agrees and understands it shall not have any power whatsoever to commit ITW to any financial outlay or any other responsibility or commitment of whatsoever nature and shall indemnify ITW from and against any and all losses, costs, claims, actions damages, liabilities, fines, penalties or expenses arising out of o resulting from any gross negligence or willful misconduct of the distributor.

(iv) Distributor agrees and understands that during the term of this agreement, the distributor shall not deal with, associate with, store or display any competitor's/ competing products in the distributor's showroom or other premises.

(v) Distributor agrees and undertakes that it shall only stock and sell genuine spare parts of the products, which shall be purchased by the distributor from ITW only.

10. FINANCIAL TERMS:

(i) The distributor shall pay to ITW an amount of Rs.30,00,000/- (Rupees thirty lakhs only) ("Exclusivity Fee") in consideration for the appointment of the distributorship as an exclusive distributor of ITW in the territory. The "Exclusivity Fee" shall be payable in 5 (five) equal. Installments of Rs. 600,000/- each (Rupees six lakhs only) with the first installment being payable on the execution of this agreement. The balance two installments shall become payable on the commencement of the successive six month period(s). The parties agree and understand that the "Exclusivity Fee" is for the total period of the agreement. In the event of earlier termination of this agreement, due to any reason whatsoever, ITW shall refund the pro-rata amount of the "Exclusivity Fee" for the unexpired period to the distributor. The unexpired period shall be calculated at six monthly rests. For example, if the agreement is terminated after two years one month, the unexpired period shall be reckoned as two years six months.

(ii) In addition to the above, the distributor shall pay to ITW the AMC royalty as per **Annexure A**, such AMC royalty and the mode of payment to be decided from time to time by the mutual agreement of the parties.

(iii) Subject to fulfillment of its obligations under this agreement, the Distributor shall purchase the products from ITW at the price in effect at the time of such sale.

(iv) The parties agree that for each transaction that ITW shall conduct with the customers in the territory, ITW shall pay the distributor an overriding commission, equivalent to 6% of all payments received from the customer for such transaction. For avoidance of doubt, the overriding commission shall not apply to transactions of ITW with key customers in the Territory.

10.3 From the perusal of the above relevant terms of the agreement, it can be seen that the agreement is primarily for marketing, promotion and distribution of the products in India by the distributors appointed by the appellant for the various territories. The amount of "Exclusivity Fee" of Rs. 30 Lakh being charged by the appellant from its distributors in the five equal installments of Rs. 6lakh each is to our understanding an amount of deposit with the appellant and if any distributorship get cancelled before the period of five years, the deposit which has been made by the appointed distributors under the category of "Exclusivity Fee" is being returned on the pro-rata basis by the appellant. With regard to AMC being referred to in the terms of agreement, on perusal of the entire agreement, to our understanding, it appears that the distributor is given a responsibility to provide after sale service of the products of the appellant which will be sold by the distributors and this AMC charges are to be shared by the distributors with the appellant. We are of the view that from the terms of agreement it becomes clear that the appellant have created distribution cum sale-marketing and after sale maintenance network by appointing various distributors in India. The Exclusivity Fee which is being charged by the appellant from its distributors is a kind of guarantee amount rather than any franchisee fee.

10.4 From the terms of agreement which we have referred above, we are of the opinion that appellant is not given any representational right to its distributors to sale or manufacture goods or provide service or undertake any process identify with the franchisor and the agreement is purely for marketing of product and therefore same cannot be termed as agreement between the franchisor and franchisee.

10.5 We also take shelter of this Tribunal in the case of *M/s. Siti Cable Network Limited vs. CST, Delhi - 2020 (8) TMI 79 - CESTAT NEW DELHI*. The relevant portion of the decision is reproduced below:-

"19. The issue that arises for consideration in these Appeals is whether the service contemplated under the agreements is a "franchise" service as contended by the Department or a service in the nature of "supply of tangible goods for use" w.e.f. May 16, 2008, as contended by Siti Cable.

20. To appreciate this issue, it would be pertinent to examine the agreements. On record there are two agreements. One is an agreement dated April 1, 2003 between Siti Cable and the proprietor of Ashirwad Cable TV Network [Ashirwad Cable]. The other is an agreement titled "right to use agreement" dated April 1, 2004 between Siti Cable and Direct Home Services Pvt Ltd.

21. The relevant terms of the first agreement dated April 1, 2003 between Siti Cable and Ashirwad Cable require examination. The First Party is Siti Cable and the Second party is Ashirwad Cable. The relevant clauses are reproduced below;

“WHEREAS First Party is in the business of running a cable networking business and is also in the business of running a Cable Channel (s) under the brand name SITI CABLE/SITI CHANNEL in various Cities/ Towns by establishing Cable Networking Business to receive and distribute communication signals to various Cable Franchisee and household customers and to produce/ procure software, to encourage the local talent and to collect the subscription and advertisement charges.

AND WHEREAS First Party has established a Cable Networking Business in the town of Panipat and having its master Control Room/ Head end at 8, Marla Colony, Behind Power House, Panipat, Haryana.

AND WHEREAS First Party has invested in establishing the Network consisting of Studio and Recording Equipment, Head end, Cable, Dishes, Poles, Computers, Modem and Other technical machines, accessories, plants for receiving and distribution of communication signals by the first party.

AND WHEREAS it is expressly understood by both the parties that all assets and materials used in establish the Network as above said are purchased/ procured and owned by the First Party and Second Party has shown his willingness to run the Cable TV Networking Business of the First Party on the terms and conditions mentioned below:

BOTH THE PARTIES HAVE DECIDED TO PUT THE FOLLOWING TERMS AND CONDITION IN WRITING:

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2. CONSIDERATION FOR RIGHT TO USE THE NETWORK: As a consideration towards right to use the assets of the First Party, the Second Party has agreed to pay 20% of net revenue to the First Party. Net revenue being defined as gross receipts less pay channel cost and operative expenses of the network. The gross receipt includes the receipts from all sources relating to cable network business in Panipat and its surrounding areas. The net revenue shall be calculated at the end of every quarter and in no case can be less than 1.50 lacs per month. The Second party shall pay the above amount to the First Party every month being the minimum amount of consideration on right to use. The said amount is to be paid by the 7th day of the succeeding month for the month. The Second Party shall send a detailed statement of affairs to the First Party showing total receipts received and operational expense incurred, every quarter, on the basis of which the surplus as mentioned above has been calculated. Any adjustments to amount receivable in excess of minimum amount are to be carried out every quarter.

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4. ELECTRICITY POLE RENTALS: That it is understood by the Second Party that the permission for using the electricity poles for laying the cable has been granted by Haryana State Electricity Board (hereinafter referred to HSEB) in favour of the First Party. The Second Party has agreed to deposit the annual pole rentals to the concerned department on behalf of the First Party during the period of this agreement alongwith the arrears accrued from time to time and the Second Party shall submit a proper receipt issued by the concerned department showing the

payments deposited on behalf of the First Party. The Second Party hereby undertake to indemnify the First Party against all claims, demands, recovery, charges, penalties be made or brought by HSEB against First Party on or after execution of this agreement.

5. PAY CHANNELS: The Second Party shall deal/ negotiate with all pay channels companies including Zee pay channels and he would be liable to pay the pay channel charges to all the broadcasting companies/ distributors/franchisees from time to time. Any activation/ de-activation of any pay channel is the sole responsibility of the Second Party and for this the Second Party shall indemnify the First party after execution of this agreement from any third party. It is agreed by the Second Party that Zee Bouquet of Channels should be run/telecast on prime band/tunable band.

6. LIST OF ASSETS: The First Party shall have access at all times to its material/ equipments installed/ used at the control room and in the network including material/ equipments supplied by it from time to time as per records maintained by the First Party. The lists of Materials/ Equipments installed/ used have been prepared as on date 7th July 2003 attached herewith as ANNEXURE-1.

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11. PERMISSION/LICENSE: It understood by the Second Party that the permission to use HSEB's pole is in the name of the first party. Other than the said permission, the Second Party shall obtain in his own name permission/license, if any, required to carry on the cable TV networking business, however, taking/obtaining such permission/license in his name and shall not provide any entitlement contrary to the agreed terms of this agreement.

12. MAINTENANCE, REPAIR AND UPKEEP OF MATERIAL AND EQUIPMENTS: The Second Party shall use and operate the equipment carefully and in workmanship manner and shall keep the equipments always in good and serviceable condition and shall also be responsible to repair, replace the damaged or broken parts or accessories with parts or accessories of equal value of the materials, equipments and other accessories installed in the network by the First Party.

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14. TRANSFER/SUB-LEASE OF NETWORK: The Second Party shall not remove or shift the control room/ Head end from the said premises at 8, Marla Colony, Behind Power House, Panipat, Haryana. Further, Second Party shall not sell, assign, mortgage, transfer/sub-let, encumber or any part of the running network of the First Party to any third person, firm, company or any other agency. If the Second Party does any of the above acts, deeds, transactions, the act, deed/ transactions shall be null and void ab initio and Second Party shall be liable for criminal breach of trust. Further, if Second Party is found doing the above act, deed or transaction, this agreement shall stand automatically terminated.

15. INSPECTION: The first party's authorised officer/ representative shall inspect the running network at any time with prior notice, during the term of this agreement. The Second Party shall provide all facilities and assistance during such inspection, which the Second Party may be reasonably expected to give.

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18. OWNERSHIP: It is understood by Second Party that all the assets, equipments and materials used in establishing and running the network as mentioned in the

Annexure-A exclusively belong to First Party and the Second Party shall not have any right/claim, of whatsoever nature, over the assets or cable TV networking business except as provided in the agreement.

19. USE OF LOGO: It is expressly understood by the parties that the "Siti Cable"/ "Siti Channel" logo is a Registered Trade Mark and property of the first party, and the First Party authorizes the Second Party to use its logo during the currency of this agreement only for business under this agreement. It has been understood and accepted by the Second Party that he shall stand prohibited from using the logo in any manner upon the consent having been withdrawn by the first party."

22. There is no material change in the second agreement dated April 1, 2004 between Siti Cable and Direct Home Services Pvt. Ltd. and therefore, the relevant terms of the agreement are not being reproduced.

23. It is clear from the aforesaid agreement that Siti Cable is in the business of running cable networking and channels under the brand name 'Siti Cable' in various cities. It invested in establishing the Network consisting of Studio and Recording Equipment, Head end, Cable, Dishes, Poles, Computers, Modem and other technical machines, accessories, plants for receiving and distribution of communication signals. Clause 2 of the 'terms and conditions' of the agreement is titled as "**consideration for right to use the network**". It provides that as a consideration towards the right to use the assets of Siti Cable, Ashirwad Cable TV Network agrees to pay 20% of the net revenue to Siti Cable every month. Clause 4 of the agreement takes note of the fact that Haryana State Electricity Board had granted permission to Siti Cable for using the electricity poles for laying the cables and that Ashirwad Cable has agreed to deposit the annual pole rentals to the Board on behalf of Siti Cable during the period of the agreement. Clause 5 specifically provides that Ashirwad Cable shall deal/negotiate with all pay channel companies, including Zee Pay Channel and would pay the channels charges. Clause 6 of the agreement specifies that Siti Cable shall have access at all times to its material/equipment installed/used at the control room and in the networking including materials/equipment supplied by it from time to time as per the records maintained by Siti Cable. The lists of the materials/ equipment installed/used as on July 7, 2003 forms part of Annexure 1 to the Agreement. Clause 12 of the agreement provides that Ashirwad Cable shall use and operate the equipments carefully and in workmanship manner and shall keep the equipments in good and serviceable condition. It shall also be responsible for repair, replacement of the damaged or broken parts installed in the network by Siti Cable. Clause 15 permits the authorized officers of Siti Cable to inspect the running network at any time. Clause 18 makes it clear that all the assets, equipments and materials used in establishing and running the network exclusively belong to Siti Cable and Ashirwad Cable shall not have any right/ claim. Clause 19 notes that Siti Cable logo is a registered trademark and provides that Siti Cable has authorized Ashirwad Cable to use its logo during the currency of the agreement only for business under the agreement.

24. The dispute in the present appeal is with regard to the levy of service tax on Siti Cable with effect from June 16, 2005 under the amended definition of "franchise". It has been defined under section 65(47) of the Finance Act to mean an agreement by which the franchisee is granted a representational right to provide service or undertake any process identified with the franchisor, whether or not a trademark, service mark, trade name or logo or such symbol, as the case may be, is involved.

25. Thus, what is important to note is that the party should be granted a representational right to provide service or undertake any process identified with the franchisor. In other words, if the condition relating to "representational right" is not satisfied, there can be no "franchise" service.

26. “Representational right” means a right that is available with the “franchisee” to represent the “franchisor” and in that *case* the “franchisee” loses its individual identity and is known only by the identity of the “franchisor”.

27. The Delhi High Court in Delhi International Airport laid down the requirements for an agreement to be considered as “franchise” agreement and the observations are as follows:-

“55. For OMDA to constitute a franchise, it would have to satisfy the requirements of Section 65(47) of the Finance Act, which inter alia requires that the franchisees (Petitioners) should have been granted representational right by franchisor (AAI).

56. Merely because, by an agreement, a right is conferred on a party to sell or manufacture goods or provide services or undertake a process, would not ipso facto bring the agreement within the ambit of a franchise. What is also required is to establish that the right conferred is a “representational right”.

57. The term “representational right” would necessarily qualify all the three possibilities i.e., (i) to sell or manufacture goods, (ii) to provide service, and (iii) undertake any process identified with the franchisor.

58. A representational right would mean that a right is available with the franchisee to represent the franchisor. When the Franchisee represents the franchisor, for all practical purposes, the franchisee loses its individual identity and would be known by the identity of the franchisor. The individual identity of the franchisee is subsumed in the identity of the franchisor. In the *case* of a franchise, anyone dealing with the franchisee would get an impression as if he were dealing with the franchisor.”

(emphasis supplied)

28. The Mumbai Tribunal in Global Transgene Limited also observed that the foremost requisite for a service to qualify as a taxable “franchise” service is that the franchisee should have been granted a representational right and that in a franchise transaction, the franchisee loses its individual identity and represents the identity of the “franchisor” to the outside world.

29. In Tata Consultancy Services Ltd., the Mumbai Tribunal observed that the grant of a representational right would imply that the person to whom such a right has been granted undertakes the entire activity as if it had been undertaken by the person granting such rights.

30. In **National Internet Exchange of India**, the Principal Bench of the Tribunal at Delhi, after examining the definition of “franchise”, observed as follows:-

“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 19 Service Tax Appeal No.55357 of 2013 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.**”

(emphasis supplied)

31. The same view has been expressed by the Tribunal in **National Internet Exchange** and **M/s. Easy Bill Ltd.**

32. In the decision of the United States District Court, D. South Carolina, Florence Division in *Englert, Inc. v. Leafguard USA* [Civil Action No. 4:09-cv-00253-TLW. (D.S.C Dec 14, 2009)] decided on December 14, 2009, the Court emphasised that there must be a significant control over the method of operation of the party for the agreement to be called a “franchise” agreement.

33. An analysis of the agreement between Siti Cable and Ashirwad Cable clearly establishes that no “franchise” service has been rendered by Siti Cable to Ashirwad Cable for the following reasons:

i) The agreement is for the ‘right to use’ assets. Siti Cable provides equipment to the cable operators for rendition of cable operator services to their end customers. The consideration received by Siti Cable from the cable operator is also only in lieu of provision of such equipment/assets. The relevant clause of the agreement states that the cable operator would pay a certain sum for use of the ‘assets’. There is no explicit or implied intention to grant representational rights in the agreement. There is also no identified consideration for the right to use of logo. This right to use the logo is only an incidental aspect to the business of broadcasting of channels, and not the purpose of the agreement.

ii) Siti Cable does not have any significant degree of control over the method of operation of the cable operators. The cable operators are free to negotiate contracts at their own end in respect of pay-channels, advertisements, etc. This deviation itself evidences that the agreement between Siti Cable and the cable operators does not grant any representational right and that Siti Cable only to provide the hardware necessary for the cable operators to render cable network services.

34 The decisions cited by the learned Authorised Representative of the Department now need to be considered.

35. In **Punjab Technical University**, the agreement entered into between Punjab Technical University and the Learning Centers explicitly provided that the Learning Centers were authorized to take students by claiming and making it clear that the education they were providing was on behalf of Punjab Technical University. The Learning Centers were also allowed to advertise to that effect. It is in this context that the Tribunal observed:

“4.....

From the foregoing there remains no doubt that LCs were authorized to take students by claiming and making it clear that the education they were providing was on behalf of the appellant. They were allowed even to advertise to that effect. It was because Learning Centers were representing the Appellant with regard to providing education, that the MOU cast strict obligations on learning Centers to ensure that the quality of education remained as per the standards of the Appellant. It also comes out from the MOU that RCs framed marketing strategies to be implemented by Learning Centers in consultation with the Appellant. As per the MOU, the format and style of any advertisement or hoarding to be placed by RCs/ Learning Centers had to be done with the prior written approval of the Appellant lest these bring down or cast aspersions on or discredit the Appellant. **Owing to the fact that Learning Centers represented the Appellant with regard to providing education, MOU laid down strict requirements of infrastructure, processes, qualifications of staff, etc. as elaborated in the MOU.** Though the MOU states that it is not a franchise arrangement and is a model of public-private partnership for deciding classification of the service rendered thereunder, we have to see the nature, terms and conditions thereof; it is immaterial as to what nomenclature is

assigned to it. **Thus, notwithstanding that the MOU states that it is not a franchise agreement, the aforesaid analysis leaves no doubt that it satisfies all ingredients of franchise as defined in section 65(47) of the Finance Act, 1994 in as much as Learning Centers were granted representational rights to provide service and to undertake various activities identified with the Appellant."**

(emphasis supplied)

36. It is for the aforesaid reasons that the Tribunal held that the arrangement between Punjab Technical University and the Learning Centers was a "franchise" arrangement. This decision, therefore, does not help the Department.

37. In Amway India Enterprises, the Tribunal observed that the distributors/ABOs have not only been granted right to sell Amway products, but they have the representational rights to sell such products. This was for the following reason:

12.....

Thus, at the first contact, the distributor is expected to make himself known in a suitable fashion as an Amway distributor and provide information concerning his name and address as well as concerning Amway and the purpose of contact, including introduction of the prospect to the Amway business. Thus, it again becomes evident that the ABO has been given right to represent Amway business. Para 12.12 of the Guide also clearly states that "if the distributor makes a serious misrepresentation of Amway or the Amway business which in Amway's opinion, is not likely to be satisfactorily remedied by corrective actions", then Amway can terminate the authorization to operate as a distributor. Thus, only serious misrepresentation of Amway or Amway business can lead to termination of distributorship. In other words, he can, indeed should/is expected to, represent Amway in accordance with and to the extent allowed as per the Amway's Business Starter Guide and Distributor Application and Terms and Conditions. In the Sections of the Starter Guide dealing with Social Media Policy, it is stated (referring to the ABOs) that "Remember, what you say reflects upon your and Amway's reputation". Now Amway's reputation can be effected by what the ABOs says only when he is taken to represent Amway in some (however limited) capacity.

(emphasis supplied)

38. The said decision is distinguishable for the factual aspect itself as neither does Siti Cable grant any representational right to the cable operators nor the cable operators are required make themselves known as Siti Cable franchisee/distributor.

39. In Board of Control for Cricket in India, the Tribunal interpreted the meaning of term 'representational right', in the context of "franchise" services and observed:

"In light of the above observations, the phrase representational right would not mean, extinguishing the identity of the franchisee, but is only to grant representational right in respect of the transaction in relation to the services that is being provided by the franchisor."

40. The principle laid down by the Tribunal in Board of Control for Cricket in India is in direct conflict with the principle laid down by the Delhi High Court in Delhi International Airport. The relevant portion of the judgment of the Delhi High Court has been reproduced above. The decision of the Tribunal in Board of Control for Cricket India, thus, does not help the Department.

41. Learned counsel for Siti Cable also submitted the objective of the agreement entered into between Siti Cable and the cable operators is to grant the right to use the "Head-end" and other hardware, which was required by the cable operators for rendering services to their end customers. The hardware was always owned and controlled by Siti Cable and against such right to use, Siti Cable was recovering periodical payments from the cable operators. Such service would, according to the learned counsel be classifiable under the category of 'supply of tangible goods for use', which was introduced by Finance Act, 2008 and made leviable to service tax w.e.f May 16, 2008. Learned counsel submitted that the agreement between Siti Cable and the cable operators stipulates that Siti Cable would allow the cable operators to use the hardware without transfer of possession and therefore, after May 16, 2005 Siti Cable has been duly paying service tax on such supply of hardware under the said category of service. Thus, when payment of service tax under the category of supply of tangible goods for use has never been contested by the Department, the confirmation of demand under the category of "franchise" service on the same transaction is not sustainable as once the Department has accepted payment of service tax under one category, which was introduced subsequently, it cannot demand service tax under a different category for the previous period. In support of this contention reliance has been placed on the following decisions of the Tribunal:

a. Aravali Construction Company Private Limited vs. Commissioner of Central Excise, Jaipur-II [2017 (6) GSTL 347(Tribunal-Delhi)]

b. Malviya National Institute of Technology v. Commissioner, Service Tax, Jaipur [2019 (6) TMI 127- CESTAT New Delhi]

c. CCE, Customs and Central Excise vs. IOCL [2019 (11) TMI 382- CESTAT Hyderabad]

42. Learned counsel for Siti Cable also submitted that once the impugned transaction has been identified as a service of supply of tangible goods for use, which was made taxable only w.e.f May 16, 2008, the same cannot be taxed under any other category prior to the introduction of such levy.

43. It will not be necessary to examine these contentions advanced by the learned counsel for Siti Cable, as the demand in the present case was made in the show cause notice under "franchise" service.

44. Thus, for all the reasons stated above, it is not possible to hold that the service contemplated under the agreement is a "franchise" service. The confirmation of demand for the period commencing June 16, 2005 upto March 31, 2008 cannot, therefore, be sustained. It is, accordingly, set aside. The confirmation of demand for interest under section 75 and penalty under section 76 of the Finance Act has also to be set aside and is set aside. The Appeal filed by Siti Cable is, accordingly, allowed."

The same view has also been taken by this Tribunal in the case of *Tata Consultancy Service Limited vs. CCE – 2019 (6) TMI 109 CESTAT-Mumbai*, the same is reproduced below:-

4.3.1 Franchisee Service-

a. As per the order of Commissioner demand under this category has been confirmed for the period from 04/2005 to 12/2006. While confirming the demand under this category Commissioner has considered demand made under two categories as per the

show cause notice Annexure 1 and confirmed the same under the category of Franchisee Services. The two demands as per the Show Cause Notice are as listed below:

Service	4/05 to 9/05		10/05 to 12/06		Total 'Rs
	Service Tax	Cess	Service Tax	Cess	
Franchisee Service	2787272	50895	1626893	32538	4497598
Business Support	0	0	4738478	94770	4833248
Total	2787272	50895	6365371	127308	9330846

b. From the above table it is quite evident that demands have been made under the category of Franchisee Service for the period from 4/05 to 12/06 and for the period from 10/05 to 12/06 demand is in category of Business Support Services. While confirming the demand the commissioner has confirmed both the demands under category of Franchisee Services. As per Section 65 (47) w.e.f 16/06/2005, franchise has been defined as follows:

"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;'"

c. Commissioner has in his order discussed the activity sought to be taxed in this category by observing as follows:

"ii. The noticee is licensed by Controller of Certifying Authority (CCA), New Delhi as a certifying authority for issuance of Digital Signature Certificates. Further, TCS appointed Sub Certifying authorities and Sub CA Administrators (Sub CAA), Registering Authorities and RA-Administration. The impugned notice seeks to levy service tax on this activity under the following categories viz.

-Franchise Service w.e.f 01.04.2004

-Business Support Services w.e.f 01.05.2005

.....

*iv. On examination of each clause of the definition of "franchise" it is found that the agreement between the noticee and Sub Certifying authorities and Sub CA Administrators (Sub CAA), Registering Authorities and RA-Administration shows that latter were indeed granted representational right to provide the certifications. **They interacted with the customers clearly representing that certification would be by TCS.** However, they were not "agents" of the noticee and were not working for any commission. Instead they were paying fees to TCS in return of the right granted to them. Thus the first clause of the definition is satisfied.*

v. However, there is nothing on record to show that TCS provided the concepts of business operation to the service receivers. There is nothing to show that they provided any know how, method of operation, managerial expertise, marketing technique or training or standards of quality control to them. Thus, the agreement doesn't pass test of second clause.

vi. It has been rightly noted in the show cause notice that in order to be recognized as a 'franchise' for the period prior to 16/06/2005, the agreement must fulfill all the four conditions. Since the agreement doesn't meet terms of second clause, it cannot

be termed as Franchise. Consequently the, the demand for the period upto 15.06.2005 is dropped.

vii. For the period from 16/06/2005 onwards, the clause (ii) to (iv) were absent in the definition and only the first clause was retained. It has already been noted above that the agreement completely meets requirement of first clause. Therefore, the agreement did amount to a franchise for the period from 16/06/2005"

d. The findings recorded by the Commissioner clearly show that he has not been able to appreciate as to what is meant by "grant of representational right". Grant of representational right would imply that the person to whom such rights have been granted under takes the entire activity as if it had been undertaken by the person granting such right. In this case the so called Sub Certifying authorities and Sub CA Administrators (Sub CAA), Registering Authorities and RA-Administration appointed by appellants have any authority to issue DSC certificates, representing them to be issued by appellant. Such transfer of right granted to appellant, by the certifying authority in terms of IT Act, 2000, is also not permissible. It is only the Appellants who could have issued the Digital Signature Certificate and this could not have been done by any other person or agency appointed by appellant. Hence mere act of collecting the applications and verification of the same for onward submission to the appellant cannot be termed as "grant of representational rights". We are supported in our view by the decision of Hon'ble Delhi High Court in case of Delhi International Airport P Ltd [2017 (50) STR 275 (DEL)] wherein it has been laid down:

"56. Merely because, by an agreement, a right is conferred on a party to sell or manufacture goods or provide services or undertake a process, would not ipso facto bring the agreement within the ambit of a franchise. What is also required is to establish that the right conferred is a "representational right".

57. The term "representational right" would necessarily qualify all the three possibilities i.e., (i) to sell or manufacture goods, (ii) to provide service, and (iii) undertake any process identified with the franchisor.

58. A representational right would mean that a right is available with the franchisee to represent the franchisor. When the Franchisee represents the franchisor, for all practical purposes, the franchisee loses its individual identity and would be known by the identity of the franchisor. The individual identity of the franchisee is subsumed in the identity of the franchisor. In the case of a franchise, anyone dealing with the franchisee would get an impression as if he were dealing with the franchisor."

e. Similarly in case of Global Transgene Ltd [2013 (32) TR 86 (T-Mumbai)] Tribunal has held as follows:

"5.2 From the above, it will follow that before the amendment w.e.f. 16-5-2005 and thereafter the foremost, and key pre-requisite to qualify as taxable service is that the franchisee should have been 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. Board, vide Circular No. 5918/2003-S.T. and Circular No. B1/6/2005-TRU, has recognized this aspect.

5.3 Undisputedly, the appellants have imported the Technology which is owned by BTC and patented in China. The said technology is imported in the form of the mother seeds and the same are multiplied in the laboratory by or on behalf of the appellants and given to the sub-licencee to further multiply for onward sale by them to the farmers for the purpose of growing commercial crop. The appellants are not

granted any 'representational right' from BTC to represent them in India, nor entitled to grant or they have actually granted any representational right to the sublicensees.

5.4 The Revenue's case rests on the premise that the logo or hallmark belonging to the appellant is put on the seed package manufactured/ marketed by the sublicensees. The appellants produced a few samples of the product package labels before us. On perusal of the samples, we agree with the appellant that the packages contain a mark "Fusion BT" which only denotes that the seeds being sold contain Fusion BT genes, and it does not denote that the said mark is either a logo or a trademark or hallmark of the appellant. The department could not show that any logo or hallmark belonging to the appellant has been put on the packages manufactured/ marketed by the sub-licensees. We further find force in the contention of the appellant that a laptop containing a label of 'windows', only denotes that the processor or the operating system/software, as the case may be in the said laptop and by putting such label, the laptop manufacturing company does not represent 'Microsoft' or become the franchisee of 'Microsoft'. Admittedly, in a franchisee transaction the franchisee loses his individual identity and represent the identity of franchisor to the outside world, as in the case of 'McDonald' the customers are not concerned with who owns the 'McDonald's restaurant (franchisee). The customers identify it with 'McDonald (the franchisor)."

f. Thus we do not find any merits in order of the Commissioner confirming these demands under the category of Franchisee Services.

11. In view of entire above discussion, we are of the view that the impugned order-in-appeal is devoid of any merits. Accordingly, we set-aside the same and the appeals are allowed.

(Pronounced in the open court on 29.08.2023)

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)