# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
# BANGALORE

REGIONAL BENCH - COURT NO. 1

## Service Tax Appeal No. 3061 of 2011

(Arising out of Order-in-Original No. 146/2011 dated 30.08.2011 passed by the Commissioner of Service Tax, Bangalore.)

**M/s. Oracle India Pvt. Ltd.**
Oracle Technology Park,
3, Bannerghatta Road,
Bangalore – 560 029. Appellant(s)

*VERSUS*

**The Commissioner of Service Tax-I**
No.16/1, 5th Floor, S.P. Complex,
Lalbagh Road,
Bengaluru – 560 066. Respondent(s)

**WITH**

## Service Tax Appeal No. 717 of 2012

(Arising out of Order-in-Appeal No. 517/2011 dated 10.12.2011 passed by the Commissioner of Central Excise (Appeals-II), Bangalore.)

**M/s. Oracle India Pvt. Ltd.**
Oracle Technology Park,
3, Bannerghatta Road,
Bangalore – 560 029. Appellant(s)

*VERSUS*

**The Commissioner of Service Tax-I**
No.16/1, 5th Floor, S.P. Complex,
Lalbagh Road,
Bengaluru – 560 066. Respondent(s)

**APPEARANCE:**

Shri Bharat Raichandani, Advocate for the Appellant

Shri Dyamappa Airani, Dy. Commissioner (AR) for the Respondent

**CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)**
**HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)**

**FINAL ORDER NO. 20613 - 20614 /2024**

DATE OF HEARING: 09.02.2024

DATE OF DECISION: 08.08.2024

**PER: R. BHAGYA DEVI**

Appeal No.ST/3061/2011 is filed against impugned Order-in-Original No.146/2011 dated 30.08.2011 and Appeal No.ST/717/2012 is filed against Order-in-Appeal No.517/2011 dated 10.12.2011 by the appellant M/s. Oracle India Pvt. Ltd. (OIPL).

2. The appellant, M/s. Oracle India Pvt. Ltd. (OIPL) is a wholly owned subsidiary of M/s. Oracle Systems Corporation, USA. They are engaged in distribution, promotion, marketing, licensing and sub-licensing of the software products developed by OIPL, USA. During investigations, the Department noticed that the appellant is engaged in distribution and sale of three types of products /services to its clients namely:

i. Software product licenses.
ii. Software product updates
iii. Software product supports.

2.1 The software updates sold and distributed by the appellant were valid for a prospective period of one year. These software updates are improved releases of the software program licenses updated and improved versions of base software programs which M/s. Oracle Systems Corporation, USA keeps developing on an ongoing basis through research and development. On all the software updates sold on or after 16.05.2008, Service Tax was paid since the Information Technology Software Service (ITSS) under Section 65(105)(zzzze) came into effect from 16.05.2008.

For the software updates sold under the invoices issued prior to 16.05.2008 where services were continued to be provided even after 16.05.2008, that part of value of services which were provided or to be provided on or after 16.05.2008 are liable for payment of Service Tax on pro-rata basis is the contention of the Department. Accordingly, based on the definition of ITSS, the appellant was liable to pay duty for the software updates which were used in the course of business. Show-cause notice dated 26.08.2010 was issued for the period 2008-09 and 2009-2010, demanding duty of Rs.15,50,51,472/- which was confirmed vide the impugned Order-in-Original No.146/2011 dated 30.08.2011. The Commissioner invoking suppression on the part of the appellant, confirmed duty amount of Rs.13,81,18,580/- along with the interest in terms of proviso to Section 73(1) read with Section 73(2) of the Finance Act, 1994 by allowing the cum-tax benefit. He imposed equivalent amount of penalty under Section 78 of the Finance Act,1994. Aggrieved by the above order, Appeal No.ST/3061/2011 is filed, and Appeal No.ST/717/2012 is against the rejection of refund on the amount paid in the above impugned Order-in-Original No. 146/2011 dated 30.08.2011. Since both appeals are interlinked, the same are taken simultaneously for hearing and disposal.

**Appeal No.ST/3061/2011**

3. The learned counsel on behalf of the appellant submitted that the period of dispute is from May 2007 to May 2008 and the show-cause notice was issued on 26.8.2010 and the entire demand was beyond the normal period. The undisputed facts are that the contract has been entered into prior to 16.05.2008. The entire consideration has been received on the date of signing of the contract. The invoices have been raised on the date of

signing of the contract. No invoices have been raised for such contract after 16.05.2008. The Contract for the Software updates with their clients is for a term of one year or more. The Contracts require upfront payment for the entire term of the contract. Prior to 16.05.2008, the Appellant did not pay service Tax on the consideration received for the Software Contracts as the Information Technology Software Service (ITSS) was not Taxable under Chapter V of the Finance Act, 1994. In other words, Service Tax being a levy on rendition of service, in the absence of levy, no Service Tax could be imposed on such transactions. With effect from 16.05.2008, the appellant paid Service Tax on the entire consideration received at the time of entering the contract. It is also submitted that there is a parallel state level VAT/Sales Tax, which treats software updates as goods, and taxes them on such basis. The Appellant has been paying state VAT on sale of software updates both pre and post 16.05.2008.

3.1 The Taxable event under Section 65(105) is any service provided or to be provided in relation to Information Technology Software. Thus, if any agreement is entered into after 16.05.2008 for service provided or to be provided after 16.05.2008, it would be taxable. However, the same would not make a service which was earlier not taxable, liable to Service Tax. The Taxable event is their right to use information technology software, which is granted and extinguished on the date the agreement is entered into. There is no additional transaction between the Appellant and the customer. There is no allegation, let alone any findings that any updates have been provided post 16.05.2008 for contracts entered into prior to 16.05.2008. During the period in question, Rule 6 of the Service Tax Rules, provided for point of taxation. Rule 6 provides that

the tax has to be paid when the payment for such service has been received. The payment has been received prior to 16.05.2008. Therefore, there can be no levy of Service Tax. Moreover, the artificial bifurcation of the value of the transaction of the single supply in two parts i.e. Prior to introduction of the levy and after the introduction of levy, is illegal and beyond the statutory provisions. Relying on the decision of the Tribunal in the case **Bajaj Alliance General Insurance Company Ltd Vs CCE: 2009 (13) S.T.R 259 (Tri-Mumbai**) which was upheld by the Hon'ble Supreme Court as reported at **2022 (64) G.S.T.L 513 (S.C)**, the learned Counsel submits that no tax can be levied on the contracts issued and where payments were made prior to the introduction of levy of Service Tax on ITSS. Also relied on the decision of the Tribunal in the case of **Reliance Industries Ltd.: 2008 (10) S.T.R (243)**, where the Tribunal held that Service Tax shall be payable on the rate prevailing on the date of provision of the Service and not the rate prevailing at the time of billing and receipt of the Payment. This decision was upheld by the Hon'ble Gujrat High Court in the case **Commissioner of Central Excise and Customs vs. Reliance Industries Ltd.: 2010 (19) S.T.R 807 (Guj)** wherein the Hon'ble High Court held as follows:

> "We have perused the order passed by the Tribunal [2008 (10) S.T.R 243(Tri- Ahmd.)] Tribunal has, in our view, taken correct view that Service tax shall be payable at the rate prevailing on the date of entry in service and not at the rate prevailing at the time of billing and receipt of payment.
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> 2. We have also gone through various provisions of Section 64 to 96 of the Finance Act, 1994 providing for Service tax and also Service Tax Rules referred to by the Counsel for the Revenue. Learned counsel for the Revenue has placed reliance on the procedural provisions under the

Service Tax Rules, 1994. In our view, substantive provisions of the Act would clearly indicate the relevant date is date of entry in service and not date of billing".

3.2 The learned Counsel further relied on the decision of the Tribunal in the case of **Commissioner of Service Tax vs. Consulting Engineering Services (I) Pvt. Ltd.: 2013 (30) S.T.R 561** which was upheld by the Hon'ble Delhi High Court as reported at **2013 (30) S.T.R 586 (Del)** wherein it was observed as follows:

"7. In the absence of any Rules, we will have to examine as to what is the taxable event. The Taxable event as per the Financial Act, 1994 is the providing of Taxable service. In the Present case, we find that not only where the services admittedly provided prior of 14.05.2023 but also the bills have been raised prior to 14.05.2023. The only thing that happened after 14.05.2023 was that the payments were received after the date. That, in our view would not change the date on which the taxable event at taken place. Since the taxable event in the present case took place prior to 14.05.2023, the rate of tax applicable prior to that date would be the one that would apply. In the present case, the rate of 5% would be applicable and not the rate of 8% consequently, We answer the question in the favor of Respondent and against the Appellant."

3.3 Reliance is also placed on the decision of the Tribunal in the case of **Principal Commissioner of CGST and Central Excise, Bhopal vs. M/s.S.R.Traders: 2023-TIOL-558-CESTAT-DEL**, which was upheld by the Hon'ble Supreme Court as reported at 2023-VIL-80-SC-ST. The learned Counsel further submits that they are on a better footing as compared to the case of M/s.S.R Traders case (supra), as in that case though the agreements were entered into prior to 01.04.2016, the contention of the Department was that the payments were received after April, 2016, and hence, the appellant would be

liable to pay service tax, in contrast in the present case all the events have taken place prior to 16.05.2008.

3.4 The learned Counsel relying on the decision of the Hon'ble High Court of Uttarakhand in the case of **Commissioner vs. Indian Institute of Petroleum** as reported at **2008 (12) S.T.R 113** submitted that even though the validity of the software updates was beyond 16.05.2008 the question of collecting service tax from the clients did not arise either at the time of raising the invoice or at the time of payment of duty, since during the relevant period they were not liable to service tax. Similarly, in the case of **Carrier Point vs. Commissioner: 2018 (10) G.S.T.L 213 (Raj)**, the Hon'ble Rajasthan High Court held that when the taxable event (Commercial training or coaching) was introduced with effect from 1.07.2003, contracts concluded prior to the levy coming into force would be liable to Tax for services rendered thereafter. The Hon'ble High Court held that Taxable service means any service provided or need to be provided to any person by commercial trading or coaching institute in relation to Coaching. Thus, any payment for a contract which was entered into prior to 1/07/2003 will not attract the levy of Service Tax.

3.5 The learned Counsel referring to the concept of valuation adopted by the Commissioner in the impugned order, submits that there is no provision in the statute which provides for pro-rata division of the contracts. The provisions of Section 67(3) read with the Valuation Rules will not be applicable to the facts of the present case because the entire consideration was prior to 16.05.2008. Referring to the Circular No.B.11/1/2002 dated 01.08.2002 issued with regard to Health Club Services where the Board clarified that no Service Tax will be payable on

membership fee already collected prior to the date on which the new Service Tax has come into force, the learned counsel submits that on the same analogy, there can be no levy for the contracts entered into prior to 16.05.2008.

3.6 The learned counsel further submitted that the Revenue for the earlier period issued show-cause notice C.No. I-26(494) ST/Audit/Gr-VII/Oracle/184/08/7666 dated 06.04.2009 and demanded tax on the software updates for the period 2004-2009 under the classification "Business Auxiliary Services." This show-cause notice which classified the services under Business Auxiliary Services was settled under the Sabka Vishwas Dispute Resolution Scheme. The current show-cause notice attempts to tax the same services i.e., software updates for the same period until 15th May 2008 under the classification of ITSS. If upheld, the current assessment taxing as an ITSS would tax the same transaction already assessed as Business Auxiliary Services in violation of settled law that the same tax cannot be imposed twice on the same transaction.

3.7 Finally, it is submitted that the entire demand is subject to limitation. It has been submitted that the entire demand is time barred. The appellant submits that the department undertook audit in the September, 2008 and all the documents and records were provided to the Department at the time of investigation but the show-cause notice was issued in 2010. The show-cause notice was clearly an 'after thought' as it was issued only after the Appellant filed an application for refund of the Service Tax and interest paid under protest during the Director General of Central Excise Intelligence (DGCEl) investigation.

4. The Authorised Representative on behalf of Revenue reiterating the findings of the impugned order submitted that though the payments are made prior to 16.5.2008, the services for the whole Calander Year which falls beyond 16.5.2008, the appellant is liable to pay Service Tax on the services rendered on or after 16.5.2008. It is also submitted that though the appellant was aware that ITSS services were liable to duty from 16.05.2008, they failed to disclose the same in their returns and hence, extended period is to be sustained. He also relied on the decision of **United India Insurance Co. Ltd. vs. Commissioner of GST and Central Excise, Chennai: 2023 (6) CENTAX (Tri.-Ahmd.)** dated 22.02.2023 wherein it was held that *'the licence to use the software in perpetuity was in consideration of the due payment by UIIC of licence fee. The licence to use the software was hence only granted after due payment. The right to use Information Technology Software supplied electronically would hence only commence at this point and the critical event on which the liability to pay tax would get fastened as per the facts and circumstances of this Agreement.'*

4.1 He also relied on the Board Circular No.65/14/2003 dated 5th November 2003 where it was stated that advance for a service which became taxable subsequently, service tax has to be paid on the value of service attributable to the relevant month / quarter which may be worked out on pro-rata basis. He also relied on Notification No.7/2005-ST dated 01.03.2005 wherein at para 5 of the Circular, it is stated that 'notwithstanding the time of receipt of payment towards the value of services, no Service Tax shall be payable for the part or whole of the value of the services, which is attributable to services provided during the period when such services were not taxable.' In view of the above, it is submitted that the appellant

is liable to Service Tax on pro-rata basis for the services rendered beyond 16.05.2008.

5. Heard both sides. The dispute pertains to the service of 'software product updates' provided by the appellants to its customers. The undisputed facts are that the appellant entered into a contract with the customers under which the appellant grants right to use the updates to the customer for all updates which are delivered subsequently to their clients during the contract period. The 'software updates' are improved releases of the programs which are made available to their clients under the contract and it is also not under dispute that the contract was entered into prior to 16.05.2008 and the 'software updates' were also issued prior to 16.05.2008 and the payment for this 'software updates' were also received prior to 16.05.2008. The dispute pertains to only those transactions where the invoices and payments were made prior to 16.05.2008. The 'software updates' as per the agreement grants right to use the updates by their clients for consideration as and when these updates are introduced and delivered to them.

5.1 The officers of DGCEI, Delhi, visited the premises on 11.11.2008 and during their investigations, it was noticed that specified contracts executed by the appellant prior to 16.05.2008 were valid for a period on or after 16.05.2008. Since the service ITSS was introduced from 16.05.2008 under clause (zzzze) of Section 65(105) of the Finance Act 1994, the appellant was liable to pay Service Tax on all software services. The appellant on 30.03.2009 deposited amount of Rs.15,33,00,824/- without admitting or accepting any liability towards the Service Tax. Since no action was taken after that, the appellant filed a refund claim dated 19.03.2010 which was acknowledged by the

department on 22.03.2010. Thereafter, show-cause notice dated 28.06.2010 was issued to deny the refund claim on the ground that the enquiry proceedings were pending before that DGCEI and it had not attained finality and also on the ground of unjust enrichment. The same was adjudicated by the original authority and upheld by the Commissioner (Appeals) vide the impugned Order-in-Appeal No. 517/2011 dated 10.12.2011, the Original Authority rejected the refund on the ground that it is premature in nature and directed the appellants to keep the refund claim in abeyance till the show-cause notice is finally decided. Aggrieved by this, the appellant filed an appeal before the Commissioner (Appeals), who rejected the refund claim on the ground it is infructuous, since the show-cause notice was decided against the appeal. Hence, the appeal is in appeal before us in Appeal No.ST/717/2012.

5.2 Later, the DGCEI issued show-cause notice dated 26.08.2010 on the ground that the appellant was not paying Service Tax on 'software updates' sold under invoices issued on or after 16.05.2008. The contention of the Revenue was that the invoices issued prior to 16.05.2008, the service obligation and validity was for a prospective period of one calendar year as seen from the invoices produced during the investigation. Since the software updates which were valid for one calendar year even after 16.05.2008 would attract service tax as applicable with effect from 16.05.2008 on pro-rata basis. This notice was adjudicated and the duty amount was confirmed after allowing the cum-duty benefit to the appellant. The adjudicating authority also held that the appellant had full knowledge regarding their liability and the number of invoices issued prior to 16.05.2008 which included provision of services beyond 16.05.2008 and since ITSS was levied to service tax from 16.05.2008 the

appellant should have declared the entire taxable value for such services in the service tax return filed by them in the month of October 2008. Since no such declaration was filed it is evident that knowingly facts were suppressed and not disclosed and having worked under the self-assessment scheme the appellant is to be aware of his liabilities and pay their duties as and when known to them and extended period of 5 years has been invoked and penalties imposed on them.

5.3 There is no dispute that ITSS service was introduced from 16.05.2008 and the appellant was liable to pay duty on all software services including 'software updates' from 16.05.2008 and they in fact have discharged service tax on all invoices related to Software updated issued on or after 16.05.2008. The present dispute is only on those invoices issued prior to 16.05.2008, payments received prior to 16.05.2008 but were valid for a calendar year where the period involved was beyond 16.05.2008. Let's examine the relied upon documents.

5.4 The agreement which is relied upon by the Revenue reads as follows:

> "Software duplication and distribution licence agreement:
>
> This agreement is effective as of the 1st day of June Two Thousand and Three by and between; Oracle Corporation, A corporation duly created, organised and existing under and by virtue of the laws of the United States of America, having its principal space of business at ……. and Oracle India Pvt. Ltd. a company duly incorporated and registered in India…….
>
> Under definitions at para 1 of the Agreement 'updates' shall mean improved releases of the programs which generally are made available to

supported sub-licencees. 'Updates' shall not include any options or future products which are licensed separately.

Under consideration at para 5 of the Agreement, it is stated that 'in consideration of the rights and licenses granted under Clause (1) above. Licensee shall pay to the Licensor royalty / sub-license fee ……. as program(s) license, updates and product supply revenue."

As seen from the above Agreement, it is undisputed fact that it was signed prior to 16.05.2008 and the invoices that surfaced during the investigation which forms part of the notice clearly shows payments were also received prior to 16.05.2008 and all the 'software updates' invoices which are under dispute in the impugned order are also dated prior to 16.05.2008. For instance, "Invoice No. 64111 dated 7.1.2008 for software updates – 1 Oracle Database Standard – Edition Processor Perpetual: 02 – JAN 08 – 01 – JAN 09". All the invoices which are part of the notice are similar to the above invoices where all have been raised prior to 16.05.2008, only their validity period goes beyond 16.05.2008. As seen from the worksheets of the show-cause notice, where it has been worked on pro-rata basis, it is seen that the software updates period comprises number of days after 16.05.2008. The only argument put forth by the Commissioner in the impugned order is the definition of ITSS under Section 65(105)(zzzze) which reads as: "taxable service" means any service **provided or to be provided** to any person, by any other person in relation to information technology software for use in the course, or furtherance, of business or commerce, including-

(i) development of information technology software,
(ii) study, analysis, design and programming of information technology software,

(iii) adaptation, upgradation, enhancement, implementation and other similar services related to information technology software,

(iv) providing advice, consultancy and assistance on matters related to information technology software, including conducting feasibility studies on implementation of a system, specifications for a database design, guidance and assistance during the startup phase of a new system, specifications to secure a database, advice on proprietary information technology software.

(v) acquiring the right to use information technology software for commercial exploitation including right to reproduce, distribute and sell information technology software and right to use software components for the creation of and inclusion in other information technology software products.

(vi) acquiring the right to use information technology software supplied electronically."

The above definition, no doubt, speaks about services provided or to be provided but as rightly argued by the appellant to be provided cannot be extended to the period when the service tax itself was not liable to be paid. Since the 'software updates' and right to use the software was prior to 16.05.2008 and also the payments were prior to 16.05.2008, the question of levying of service tax on these updates only because their validity periods extend beyond 16.05.2008 cannot be the criteria for levy of service tax. Nowhere the provisions of service tax call for such levy.

6. In the case of **Carrier Point** (supra), the Hon'ble High Court of Rajasthan, was dealing with the question whether

service tax can be levied on the amount received prior to the date of levy when registration and invoice could not be raised to collect indirect tax and provisions of Provisional Collection Act were not applicable and Section 66 of the Act, impose the levy with effect from 01.07.2003. Their Lordships have held that:

> **"30.** The assessee herein has entered into a concluded Contract much prior to coming into force of Service Tax law and in view of the clarification which has been issued in 2005 which clearly made out the case for the appellant inasmuch as the legislation has now used the language after 2005 which clearly states as under;
>
> > *"Taxable service means any service or to be provided to any person by a Commercial training or coaching classes in relation of the Coaching".*
>
> **31.** In that view of the mater, it is very clear that prior thereto, there is authority interpretation of the provision as services which are referred to be provided in future was not covered. Even otherwise in view of the law Concluded Contract cannot be revived in view of subsequent development which will lead to a very odd situation with the assessee and he has to suffer in his business and has to face the breach of contract.
>
> **32.** In that view of the matter when we have to interpret the taxing statute, we have to interpret Article 265 and the possibility of interpretation should not be avoided to be very impracticable for either of the side.
>
> **33.** In that view of the matter, we make it clear that any payment of contract which are entered after 1-7-2003 will invite Service Tax and any contract which is concluded prior to 1-7-2003 will not invite imposition of Service Tax."

This decision was affirmed by the Hon'ble Supreme Court in 2023-VIL 80-SC-ST dated 22.8.2023.

6.1 In the case of **Art Leasing Ltd.** (supra), the Tribunal observed as follows:

> **"5.** The Banking and Financial Services came under the Service tax net w.e.f 16-7-2001. At that time, CBEC issued clarification to the effect that in respect of Hire Purchase Contracts entered prior to 16-7-2001 and instalments of which were received after 16-7-2001, there is no Service tax liability. In our view, the same logic is applicable to the present case also. When the Hire Purchase contract is entered, the taxable event occurs. We agree with the appellants that the instalment payments are only obligations of the hirer. The finding of the Commissioner (Appeals) that the appellant continues to provide service during the payment of installments is not correct. Therefore, the rate of Service tax will be the rate prevailing on the date on which the contract is entered into. Consequently, the demand of differential amount applying the higher rate, which came into effect from 14-5-2003, will not be applicable in respect of the contracts entered prior to that date. Hence, we set aside the impugned order and allow the appeal with consequential relief, if any."

6.2 In the case **Bajaj Alliance General Insurance Company** (supra), the Tribunal held that:

> **"11.** The issue involved in this case is whether the service tax is payable on a premium in terms of the insurance policy covering the future period at revised rate if the rates are revised by law, during the operation of policy already issued and Service Tax liability is discharged. The adjudicating authority has come to the conclusion that "collection of advance for the value of said service shall not therefore be the taxable event unless the service is rendered. In other words, receipt of value of service is secondary to the rendering of service". Coming to such a conclusion, the adjudicating authority relies upon the clarification given in Circular No. 65/14/2003 dated 5-11-2003.

**12.** The provisions of Finance Act, which covers the services rendered by the appellants are given under Section 65(49) "general insurance business". In the said Section further definitions of "insurance agent" and "insurance auxiliary service" are also given, which are as under :-

> *"Insurance agent has the meaning assigned to it in clause (10) of section 2 of the Insurance Act, 1938.*
>
> *"Insurance auxiliary service " means any service provided by an actuary, an intermediary or insurance intermediary or an insurance agent in relation to general insurance business or life insurance business and includes risk assessment, claim settlement, survey and loss assessment."*

**13.** The taxable services, i.e., considered for discharge of service tax liability are enumerated in the sub-section 65(105). The taxable services in this case of general insurance business is enumerated at 65(105)(d), which is "to a policy holder by an insurer carrying on general insurance business in relation to the agent, insurance business".

**14.** It is undisputed that the appellant is carrying out the business of general insurance. It is also undisputed that the appellant collected the premium in advance as provided under the provisions of Section 64VB of the Insurance Act, 1938 on insurance/assurance on the policy issued. The said Section 64VB of the Insurance Act, 1938 is as under :-

> *"No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed, is made in advance in the prescribed manner.*
>
> *For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer "*

In the present case, admittedly all the invoices and payments were made prior to 16.05.2008 when service tax was levied on software services under ITSS. Therefore, in view of the above decisions, the question of levying Service Tax on the invoices and payments prior to 16.05.2008 when the service itself was not leviable to tax, cannot be sustained.

6.3 The reliance placed upon by the Revenue in the case of United India Insurance Co. (supra) is distinguishable in as much as the question there was 'the question that arises in this appeal is whether the point of taxation for right of use of IT software would be the date on which is downloaded on or after the commencing of the software. It is not disputed that the software is downloaded in December 2007 while the said service tax brought under the tax net only on 16.05.2008.' It was observed by the Tribunal that the contract for the right to use the software i.e., end-user license agreement was entered into on 27.05.2008, although it was done with an earlier effective date as 01.01.2008. It is only after signing of the above agreement, it license to use the software in perpetuity was in consideration of the due payment by UIIC of license fee. Subsequently invoice dated 22.7.2008 was raised and the license to use the software was granted only after this payment. Since, the occurrence of the event happened after 16.05.20008, the appellant was liable to pay service tax. It is categorically noted by the Tribunal the service has been supplied only after information technology software was brought under the tax net and hence subject to levy. Contrary to the above facts, in the present case, undisputedly the agreement has been signed on 1st June, 2003 and the all the invoices on 'software updates' are admittedly issued and payments made prior to 16.05.2008. Therefore, only because the validity of the software update is for a Calander

year and a part of the period falls after 16.05.2008, there cannot be a levy of service tax as per the provisions of law.

6.4 The reliance placed by the Revenue on the advances is not relevant to this case. As rightly pointed out by the learned counsel, Clause (5) of Notification No.7/2005 relied upon by the Revenue supports the case of the appellant as the entire consideration for services was received prior to 16.05.2008 and no service tax shall be payable for the part or whole of the value of the services which is attributed to services provided during the period when such services were not taxable and therefore, the question of bifurcating the value on pro-rata basis is not in accordance with law.

6.5 The reliance placed by the learned counsel on the Circular No.B.11/1/2002 dated 01.08.2002 issued with regard to Health Club Services where the Board clarified that no Service Tax will be payable on membership fee already collected prior to the date on which the new Service Tax has come into force, is admittedly applicable in the present case, since admittedly the invoices and payments have been made prior to introduction of Service Tax on ITSS on 16.05.2008.

7. On limitation, it is to be noted that the same transactions for software updates were categorized under Business Auxiliary Service and show-cause notices were issued on that account for the period 2004-2009 which is inclusive of the present period of dispute, which was settled under SVLDRS. In the present case, the DGCEI issued notice only after refund claim was filed by the appellant and the notice does not reveal any facts that were suppressed or mis-declared. The Revenue cannot expect the appellant to declare those invoices and payments paid prior to the levy of tax on ITSS to be declared in their returns. Moreover,

when the same transactions were considered as Business Auxiliary Service, the question of suppression does not arise. Hence limitation fails. In view of the above, the impugned order is set aside and the appeal No.ST/3061/2011 is allowed.

**Appeal No.ST/717/2012**

8. The appeal is filed against the impugned Order-in-Appeal No.183/2011 dated 10.12.2011 passed by the Commissioner (Appeals), who rejected the refund claim on the ground that the amount paid by the appellant at the time of investigation was adjudicated vide Order-in-Original No.146/2011 dated 30.8.2011 confirming the demand. Hence, the Commissioner (Appeals) disposed of the appeals as infructuous. The subject matter of the above Order-in-Original is in question under Appeal No.ST/3061/2011 which now stands decided in favour of the appellant. In view of the above, this appeal stands remanded to the original authority to consider the refund application afresh. Needless to say, an opportunity of being heard to be given to the appellant before processing the refund claim.

9. In the result, Appeal No. ST/3061/2011 is allowed and Appeal No. ST/717/2012 is allowed by way of remand.

(Order pronounced in Open Court on 08.08.2024.)

**(D.M. MISRA)**
**MEMBER (JUDICIAL)**

**(R. BHAGYA DEVI)**
**MEMBER (TECHNICAL)**

rv