Grant Thornton

#GTBharat
SHAPING A VIBRANT INDIA

Point of taxation for digitally downloaded software is the date of EULA, i.e., when the right to use is granted – CESTAT Chennai

14 March 2023

Summary

The Customs Excise Services Tax Appellate Tribunal (CESTAT) Chennai Bench has held that in the case of digitally downloaded software, the date of signing of the End User License Agreement (EULA) would be the event when the right to use the software shall be said to be granted. Hence, this is the critical event on which the liability to pay tax would get triggered. Merely downloading the software onto a computer would not be of help unless the right to use it has been granted. In the present case, apart from downloading the software, all other major activities that facilitated the actual right to use the software took place only after the Information Technology Software Service (ITSS) was brought under the tax net from 16 May 2008. Hence, the CESTAT held that the receipt of application software technology electronically from the overseas entity is subject to the levy and upheld the impugned order levying service tax, along with interest and penalty.

Facts of the case

- M/s. United India insurance Co Ltd. (UIIC) (the appellant) was engaged in providing services under the category of general insurance services and insurance auxiliary service as defined under Clause 55 of Section 65 of the Finance Act 1994.
- During audit, it was noticed that M/s. SSP Sirius Ltd. UK (SSPSL) had provided application software technology, i.e., 'Core Insurance Solution' for use in the business of the appellant. Since SSPSL was incorporated in the UK and has no permanent establishment in India, the appellants was found liable to pay service tax on the service provided by SSPSL, in view of Section 66A of the Finance Act 1994. The appellant had paid the tax along with interest and claimed refund of the same, as according to it, no tax was payable on the supply, even prior to the introduction of the service in the Finance Act.
- Thereafter, a Show Cause Notice (SCN) was issued to the appellant, confirming the demand, along with a penalty.
- The appellant contends that the information technology software was supplied to them electronically from abroad by SSPSL and downloaded in December 2007 before the introduction of the service in the Finance Act 1994. Hence, no tax could be levied on the subject supply. Therefore, the appellant filed the present appeal before the CESTAT.

CESTAT Chennai observations and ruling (Service Tax Appeal No. 370 of 2012 order dated 22 February 2023):

- **Mere downloading of software is of no use unless having right to use it:** In the context of the ITSS, merely downloading the software onto a computer would not be of help unless it can be used. The taxable event of the service must be understood, from the point of view of the service being provided to any person by any other person, who is providing the right to use the information technology software supplied electronically.
- **Right to use occurred after signing of EULA:** The contract for the right to use the software, i.e., EULA, was entered into on 27 May 2008, although it was done with an earlier effective date as 1 January 2008. It is only after the signing of the EULA, i.e., on 27 August 2005, that the right to use the software can be said to have occurred. The 'right to use ITSS electronically' would hence only commence at this point and is the critical event on which the liability to pay tax would get fastened as per the facts and circumstances of this agreement.
- **Right to use ITSS was granted after it was brought under tax net:** From the timeline of events in the present case, apart from the downloading of the software, all other major activities that facilitated the actual right to use the software took place only after the ITSS was brought under the tax net from 16 May 2008. Hence, such service is subject to the levy.

- **Impugned order upheld:** It has been held by constitutional courts that appellate bodies cannot be unmindful of the great weight to be attached to the findings of facts of the original authority that has first-hand knowledge and is in a position to assess the facts and the credibility of circumstances from their own observations. The exception would be if the order is illogical or suffers from procedural impropriety. Otherwise, even if a superior appellate body feels that another view is possible, it is no ground for substitution of that view in exercise of its appellate power. There is also nothing disproportionate or shocking in the penalty imposed to call for modification or interference of the impugned order by this appellate forum.

Our comments

Even generally while downloading any software online, an agreement window pops up that needs to be accepted by the user, and only then the software gets downloaded. Thus, when users accept the terms and conditions, they are granted the license to use the software.

The present ruling is in line with the generally accepted practices and should help provide clarity to taxpayers on similar issues.

Contact us

To know more, please visit **www.grantthornton.in** or contact any of our offices as mentioned below:

NEW DELHI
National Office,
Outer Circle,
L 41, Connaught Circus,
New Delhi - 110001
T +91 11 4278 7070

NEW DELHI
6th Floor, Worldmark 2,
Aerocity,
New Delhi - 110037
T +91 11 4952 7400

AHMEDABAD
Unit No - 603 B, 6th Floor,
Brigade International
Financial Center,
GIFT City Gandhinagar,
Ahmedabad - 382355

BENGALURU
5th Floor, 65/2, Block A,
Bagmane Tridib,
Bagmane Tech Park,
CV Raman Nagar,
Bengaluru - 560093
T +91 804 243 0700

CHANDIGARH
B-406A, 4th Floor,
L&T Elante Office Building,
Industrial Area Phase I,
Chandigarh - 160002
T +91 172 433 8000

CHENNAI
9th floor, A wing, Prestige
Polygon,471 Anna Salai,
Mylapore Division,Teynampet,
Chennai - 600035
T +91 44 4294 0000

DEHRADUN
Suite No 2211, 2nd Floor,
Building 2000, Michigan Avenue,
Doon Express Business Park,
Subhash Nagar,
Dehradun - 248002
T +91 135 264 6500

GURGAON
21st Floor, DLF Square,
Jacaranda Marg,
DLF Phase II,
Gurgaon - 122002
T +91 124 462 8000

HYDERABAD
Unit No - 1, 10th Floor,
My Home Twitza, APIIC,
Hyderabad Knowledge City,
Hyderabad - 500081
T +91 40 6630 8200

KOCHI
6th Floor, Modayil Centre Point,
Warriam Road Junction,
MG Road
Kochi - 682016
T +91 484 406 4541

KOLKATA
16th floor, Ambuja Eco-Centre,
Plot No. 4, EM Bypass, EM Block,
Salt-Lake Sector-V, Kolkata,
West Bengal - 700091
T +91 33 4444 9300

MUMBAI
11th Floor, Tower II,
One International Center,
SB Marg Prabhadevi (W),
Mumbai - 400013
T +91 22 6626 2600

MUMBAI
Kaledonia, 1st Floor,
C Wing,
(Opposite J&J Office),
Sahar Road, Andheri East,
Mumbai - 400069

NOIDA
Plot No 19A, 2nd Floor,
Sector - 16A,
Noida - 201301
T +91 120 485 5900

PUNE
3rd Floor, Unit No 310-312,
West Wing, Nyati Unitree,
Nagar Road, Yerwada
Pune - 411006
T +91 20 6744 8800

For more information or for any queries, write to us at **GTBharat@in.gt.com**

Follow us @GrantThorntonIN