Nokia (I) Pvt. Ltd. vs Commissioner Of Customs on 23 January, 2006

ORDER

R.K. Abichandani, J. (President) Page 0073 FACTS:

1. This appeal is directed against the order of the Commissioner of Central Excise (Appeals), Delhi, made on 29.10.2004 to the extent that it upholds the demand of service tax of Rs. 3, 40,63, 905/- with interest and the reduced penalty of the like amount and upholds the demand of interest under the provisions of the Finance Act, 1994.

2. On an information that the appellant Nokia India Ltd., New Delhi was providing taxable services as consulting engineers without getting registered with the Service Tax Department and were not paying the service tax, the officers of the Anti Evasion Branch of the Central Excise Commissionerate, Delhi, visited the premises of the appellant at Commercial Plaza, Radisson Complex, New Delhi on 7.2.2001 to ascertain the nature of services provided by the appellant to their customers. It transpired from the statement of Financial Controller of the appellant, who was conversant with the functioning of the company, that the appellant was a 100% subsidiary of Nokia Networks Oy Finland and that it was implementing and commissioning the GSM equipment purchased by various cellular operators in India; that the customers of Nokia India Ltd., i.e. the appellant were, BPL Cellular Ltd., Tata Cellular Ltd., Skycell, Spice Cell, Facel etc.; that there were contracts between the customers and the appellant for implementing and commissioning of the equipment; that these were service contracts; that the cellular equipment consisted of Mobile Switching Centre (MSC) installed at the operators premises and Base Station Controller (BSC) installed at different locations; that the equipment was implemented and commissioned by qualified engineers who were their employees and most of them were degree holders; that implementing one switch normally took 3 to 4 weeks; that as per the service contract, the main services being provided by them for installing and commissioning included system design, Page 0074 installation, supervision, training of operator's engineers, consultancy and technical assistance services; that the customers used to enter into another agreement known as technical support agreement for the maintenance of equipment purchased from Nokia Networks Oy; that whenever the customer was faced with any problem in the equipment, their help desk received a call which was directed to a qualified engineer; that the engineer would suggest a remedy and when it did not work, the engineer had to visit the premises of the customers to rectify the fault; that if the contract covered replacement of card modules and the fault was actually found in the cards, those were replaced by them out of the spares; that problems relating both to hardware as well software were covered under the technical support agreement and that the engineers

sometimes had to find the exact problem and rectify it, and that most of the technical agreements were for one year or above. It was also stated by him that whenever the customers used to upgrade or expand the existing system, service contracts were entered into for the purpose of providing them implementation and commissioning services. A copy of service contract with Facel and technical support agreement with Facel was produced by him.

2.1 The appellant-assessee while submitting details of amounts collected from their customers on account of implementation and technical support by their letter dated 20.2.2001 defended the non-levy of service tax on the ground that the work carried out by their company was in the nature of actual execution of jobs and not in the nature of advisory or consultancy services and that the statutory definition of "consulting engineer" which referred to professionally qualified engineers or an engineering firm did not apply to a company.

2.2 Relying upon the circular dated 2.7.97 issued by the Central Board of Excise and Customs (CBEC) and trade notice dated 4.7.97 regarding service tax on consultancy services in engineering clarifying that consultancy engineers shall include self-employed, professionally qualified engineer who may or may not have employed others to assist him or it could be an engineering firm whether organized as a sole proprietorship, partnership, a private company or a public limited company, the Revenue issued show cause notice dated 11.4.2002, amended by the corrigendum dated 7.3.2003, requiring the appellant to show cause against the demand of service tax of Rs. 7,03,717/- along with interest and penalty.

2.3 By their letter dated 30.5.2002 and subsequent letter dated 22.7.2003, while denying the allegations made in the show cause notice, the appellant submitted that as per the contract with GSM Cellular Companies, the appellant performed integrated and comprehensive installation activities involving installation, commissioning and testing of telecommunication, equipments, and that the appellant was not responsible for designing or drawing the technical specifications and was not engaged in providing any advisory services. It was submitted that under the agreement, the appellant had to perform specific repair services for its customers in cases of break-downs and mall functions of equipment and Page 0075 to restore the functionality of equipment and the software. According to the appellant, the agreement can be termed as a contract for performance of maintenance and repair activities akin to a maintenance contract. It was pleaded that the appellant was rendering work as a contractor and not in capacity of consulting engineers. It was also contended that the expression "technical assistance" which was not defined in the Act, should be understood in the context of advice and consultancy, applying the principle of nocitur a sociis.

2.4 The learned Additional Commissioner by order dated 10.10.2003, on the basis of the material on record, came to a finding that the nature of service provided by the appellant was covered under the category of consulting engineer services and that they had failed to take registration with the Service Tax Department and evaded payment of service tax on the amount billed for the service charges during the period in question. Accordingly, the learned Additional Commissioner confirmed the demand of service tax to the tune of Rs. 7,03,10,717/- with interest for the services provided by the appellant during the period between July 1997 to December 2000 under Section 66 read with

Sections 68 and 73 of the Finance Act, 1994, and imposed a penalty of Rs. 3,00,000/- under Sections 76 and 77 and a further penalty of Rs. 14,00,00,000/- under Section 78 for suppression and concealment of value and service tax payable. Interest was demanded under Section 75 of the Act on the amount due till the date of payment.

3. The Commissioner (Appeals), in the appeal filed by the present appellant, while dealing with the contention that the order in original was passed without jurisdiction, held that the appellant was having its registered office at Commercial Plaza, Radisson Complex, New Delhi, which was under the jurisdiction of Delhi-1 Commissionerate and the authority that had issued the show cause notice was working in that Commissionerate and was, therefore, empowered to issue the same being a proper officer for the area of the appellant which fell within his jurisdiction. Likewise, the Additional Commissioner of Central Excise, Commissionerate Delhi -II, was the proper officer to decide the case of the assessee whose registered office fell under the Central Excise Commissioner, Delhi -II after the bifurcation of Delhi -I Commissionerate into Delhi-I and II with effect from November 2002. It was observed that the law provided facility for decentralized registration to those who came forward for registering themselves voluntarily, but the law did not give any facility to a person who did not come forward for registration and was detected and was given a show cause notice. It was held that such person cannot utilize or exercise the option of decentralized registration. It was further held that the show cause notice had been issued by the appropriate authority, and that the adjudicating authority was competent to decide the matter on the basis of the show cause notice and the proceedings held against the appellant. He then held that on the perusal of the service contract and the technical support agreement, it was evident that the nature of services provided by the appellant, namely, training, consultancy, technical assistance and other activities of work-services provided for Page 0076 consideration, fell under the category of technical assistance and that these were within the category of services of "consulting engineer". Taking into consideration the break-up of the demand given by the appellant, it was held that the appellant was entitled to a relief on the basis that service tax was payable on the amount actually realized towards the services provided in the particular period and not on the amount of consideration which was not realized for the service rendered. As regards the amount of consideration billed for goods sold, it was held that no service tax could be imposed on such transactions. It was further held that service tax was not payable in respect of services which were outside the purview of the category of consulting engineering services and, therefore, the demand of service tax confirmed on account of installation, erection and commissioning was liable to be dropped. As regards the consideration charged for training of personnel, it was held that since the amount of consideration for training was distinctly ascertainable, it was subject to service tax in view of the circular dated 2.7.97. As regards hardware repair and software support, operation and maintenance and assistance, Help Desk and emergency support, the Commissioner (Appeals) rejecting the contention that these were within the scope of repair and maintenance and therefore, not liable to service tax, held that all these services were definitely in the nature of providing technical assistance. It was held that the consideration amount of Rs. 8,16,46,525/- which was classified under the head "unexplained" by the appellant and the amount of Rs. 3,18,79,965/- which was tabulated under the head "others" showed that the amounts pertained to charges under Help Desk, O&M assistance and emergency support, technical consultancy etc. which were also in the nature of providing technical assistance, and hence chargeable to service tax. It was observed that the words "technical assistance in any manner"

incorporated in the definition of consulting engineers given in the Act were of a wide dimension, and their meaning was not bogged down to intellectual advice, but rather involved technical assistance in actual execution of job, training of personnel so as to make them technically competent to handle the sophisticated telecommunication equipment. It was held that the services provided by the appellant, as set out in the chart qualifying the service tax were highly technical in nature which could be accomplished by highly trained, competent and qualified engineers. The assistance provided by the appellant to their clients was of highly technical nature falling within the purview of "consulting engineer" as defined under the Act. It was noted that huge amount of fee/charges was collected by the appellant which was not commensurate with the wages paid to an ordinary technician. It was further held that the appellant having failed to inform the department about their activities by not getting themselves registered, rendered themselves liable to penal action and that the extended period of five years, was rightly invoked. It was, however held that the imposition of penalty of Rs. 14,00,00,000/- and Rs. 3,00,000/- on the appellant was excessive. The demand of service tax was accordingly reduced to Rs. 3,40,63,905/- and the penalty to the like amount.

Page 0077 Arguments on behalf of the appellants:

4. It was contended on behalf of the appellant that the Commissioner, Delhi, had no jurisdiction regarding services which were rendered by the appellant outside Delhi. It was argued that Rule 4 of the Service Tax Rules gave an option only to the assessee to resort to centralized registration and it was not mandatory under that provision to apply for centralized registration. Merely because centralized billing was done from a particular place, proper officer having jurisdiction over that place could not assume jurisdiction of all places where services were rendered. Therefore, the demand raised in the instant case covering all the places from where the appellant rendered the service was ex facie incorrect. It was argued that the appellant company was not a qualified engineer or a firm and was, therefore, not within the ambit of the definition. It was then submitted that the activity done by the appellant was not of consulting engineer and that it fell under the category of maintenance and repair. It was contended that while the agreement was referred to as technical support agreement, its mere nomenclature was not determinative of its being consulting engineer's service being rendered under it. The technical support agreement in question was neither advice nor consultancy so as to come under the definition of "consulting engineer" under Section 65(19) of the said Act. The phrase "technical assistance" in the definition of "consulting engineer" was to be read so as to take colour from the words "advice" or "consultancy" with which it occurred in the definition clause. It was submitted that the word "consult" implied a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least a satisfactory solution. It was submitted that the consultancy job was cerebral in nature and involved guiding, advising the client or finding a workable response to an emergent problem. According to the learned Counsel, the nature of work of consulting engineer being cerebral and not executory and the activities of the appellant being executory, they did not come within the ambit of advice or consultancy which were contemplated under the definition of "consulting engineer", but came under category of maintenance or repair/operation and maintenance. It was then argued that in case of composite contracts involving several obligations, it is impermissible to vivisect the contract and treat it as pertaining to service of consulting engineer. It was then contended that softwares were covered under the Notification No. 4/99-ST dated 28.2.99 and software support

service was exempt under that notification. Furthermore, training to the employees of the cellular operators cannot come under consulting engineer services, because there was no advice or consultancy involved, but only a general training of the employees at various levels. It was also submitted that hardware repair service pertained to supply of hardware and, therefore, no consultancy was involved. Similarly, no service tax could be recovered on standard help desk services which pertained to executory function beyond the stage of consultancy and advice. It was argued that implementation of contractual terms did not amount to giving of advice and consultation and that execution of work was distinct from giving of any advice or technical assistance. Therefore, rendering of emergency Page 0078 support or services in respect of operation and maintenance or for training of the staff, did not amount to rendering such taxable service.

4.1 The learned Counsel for the appellant relied upon the following precedents in support of his submissions :

(a) The decision of the Supreme Court in The Bhopal Sugar Industries Ltd. v. Sales Tax Officer , was cited for the proposition that while interpreting the terms of an agreement, the Court has to look to the substance rather than the form of it.

(b) The decision of the Supreme Court reported in Rohit Pulp and Paper Mills Ltd. v. CCE Mumbai , was cited for the proposition that in interpreting the scope of any notification, the court had to first keep in mind the object and purposes of the notification and that all parts of it should he read harmoniously in aid of and not in derogation of that purpose. The Supreme Court considered the principle of statutory interpretation noscitur a sociis and also noted that the maxim was described by Diplock C.J. as a 'treacherous one unless one knows the societas to which the socii belong'. (Letang v. Coopex 1965-1 Q.W.B.232).

(c) The decision of the Supreme Court in Union of India v. Sankalchand, Himatlal Sheth , was cited in support of the contention that the word 'consult' implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least a satisfactory solution.

(d) The decision of the Tribunal in Glaxo Smithkline Pharmaceuticals Ltd. v. CCE, Mumbai reported in 2004-TIOL-331-CESTAT-Mum., was cited in support of the contention that the nature of executory services provided by the Marketing Team Staff were held to be more appropriately falling under Business Auxiliary Service and not Management Consultancy service.

(e) The decision of the Tribunal in Commissioner of Central Excise, Chennai v. MRF Ltd. reported in 2005 (179) 472, was cited to point out that the Tribunal accepted the contention that the new service introduced for the purpose of levy of service tax, namely, scientific and technical consultancy services could not be treated as part of the existing consulting engineer service.

(f) The decision of the Tribunal in Daelim Industrial Co. Ltd. v. CCE, Vadodara reported in 2993 (155) ELT 457, was cited for the proposition that work contract cannot be vivisected and part of it subjected to service Page 0079 tax under Section 65(13) of the said Act. In that case, the contract in question involved 'residual process design, detailed engineering, procurement, supply, construction, fabrication, erection, installation, testing, commissioning and mechanical guarantee'.

(g) The decision of the Tribunal in BPL Mobile Communications Ltd. v. Commissioner of Customs, Mumbai reported in 2000 (126) ELT 986, was cited in order to point out that it was held that computer software contained in tapes, cartridges or CD-ROMs used for different specific sectoral functions like call monitoring, base transceiver, mobile switching center and immediate switching in mobile telephone were entitled to duty exemption under S.No. 173 of the Table annexed to Notification No. 11/97-Cus. Dated 1.3.97 and that the decision was affirmed by the Supreme Court by its order dismissing the appeal as in its opinion the decision of the Tribunal did not call for any interference. In that case, the Notification 11/97-Cus. exempted from duty computer software falling under Chapter 49 or Heading 85.24 of the tariff.

(h) The decision of the Supreme Court in Tata Consultancy Services v. State of Andhra Pradesh reported in 2004 (178) ELT 22 (SC) was cited for the proposition that since software was capable of abstraction, consumption, use, transmission, transfer, delivery, storage, possession etc. it was included as 'material articles and commodities' in the definition of 'goods' in Section 2(h) of Andhra Pradesh General Sales Tax Act, 1957. It will be noticed from paragraph 24 of the judgment that the Supreme Court held that: "A software programme may consist of various commands which enable the computer to perform a designated task. The copyright in that programme may remain with the originator of the programme. But the moment copies are made and marked, it becomes goods, which are susceptible to sales tax". [Emphasis added]

(i) The decision of the Tribunal in Rolls Royce Industrial Power (I) Ltd. v. CCE Vizag , was cited in support of the argument that operation and maintenance contracts are not to be regarded as consulting engineer service.

(j) The decision of the Tribunal in Sri Chakra Tyres Ltd. v. CCE Madras (LB) and in CCE v. Maruti Udyog Ltd. reported in 2002 (49) RLT 3, was cited in support of the contention that gross realization was inclusive of service tax, and therefore, duty demand was required to be recomputed.

(k) The decision of the Supreme Court in Hindustan Steel Ltd. v. The State of Orissa , was cited for the decision Page 0080 where there was neither suppression nor any intention on the part of the assessee to evade payment of tax, imposition of penalty was not justified.

(l) The decision of the Madras High Court in Skycell Communications Ltd. v. Deputy Commissioner of Income-tax , was cited for the proposition that, mere collection of a fee for use of a standard facility provided to all those willing to pay for it did not amount to the fee having been received for technical services. That decision was rendered in the context of technical service referred in Section 9(1)(vii) in which Explanation II provided that "fees for technical service" for the purpose of that clause would mean any consideration for rendering of any managerial technical or consultancy services, but did not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would he income of the recipient chargeable under the head 'salaries'.

(m) The decision of the Supreme Court in Consolidated Cofee Ltd. and Anr., v. Coffee Board, Bangalore, M.S.P. Exports (P) Ltd. and Ors. v. Coffee Board and Ors., TGM Assadi and Sons and Anr. v. State of Karnataka and Ors. and Verma Exports (P) Ltd. v. State of Karnataka and Ors. , was cited in the context of principle of noscitur a sociis to point out from paragraph 14 of the judgment that Maxwell on interpretation of a statutes was quoted in connection with the said principle wherein it was explained that where two or more words, which are susceptible of analogous meaning, are coupled together they are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general.

Arguments of behalf of the Respondent:

5. The learned authorized representative for the department submitted that the appellant did not get itself registered at all, as required by Rule 4 of the said rules, and since the billing was always centralized even before the registration which was done at Delhi, in view of the head office of the appellant being in Delhi, the Commissioner had jurisdiction to issue the show cause notice. It was also submitted that the services were supplied from Delhi and that the contract was also executed in Delhi. It was pointed out that as per various clauses of the agreement, such as Clauses 1.1, 5.1.1, 5.3.1, 5.3.5, the services were being supplied from Delhi. Payment was also to be made in Delhi. Reliance was placed on Clauses 5.6 and 10.3 in this regard. It was further submitted that under Section 12E of the Act, higher authority can exercise the powers of its lower authority. It was then argued that the word "firm" used in the definition clause of 'consulting Page 0081 engineer' included a company. Reliance was placed on the decision of the Calcutta High Court in M.N. Dastur & Co. Ltd. v. Union of India in support of this contention. It was also pointed out that in Tata Consultancy Services v. Union of India , the Karnataka High Court had taken a view while considering the provisions of Section 65(13) and Section 68(1) of the said Act, that the Act made no distinction between different categories of service providers, be they individuals, partnership concerns or incorporated companies. He also drew our attention to the decision of the Tribunal in Transweigh (India) Ltd. v. Commissioner of Central Excise, Mumbai in which the Tribunal following the ratio of the decisions in Tata Consultancy Services (supra) and M.N. Dastur (supra) held that the Act did not make any distinction between different categories of service providers, be they individuals, partnership concerns or the incorporated companies. He pointed out from the publication of

Consulting Engineers association of India, a copy of which was on record, the nature of services provided by consulting engineers. As per this publication consulting engineers offered a broad spectrum of services ranging from sector studies to the evaluation of proposals and the design and monitoring of construction of projects. In this publication, "Member Directory 2000" of the said Association of Consulting Engineers, it is indicated that the consulting engineers can offer professional expertise in studying the technical and financial viability of a project, process development and basic engineering design, executing detailed design, supervision of competitive tendering procedures, overall management and quality of materials, providing commissioning assistance and start-up, exercising financial controls, and can additionally advise on varied matters of engineering, act as arbitrator, mediators, adjudicator and expert witness, make independent checks of design calculations and certify compliance with engineering regulations, inspect plan and requirement at source. It is also stated, under the heading "Project Management", that they can contract to plan and manage a project in its entirety and will provide design services, procurement, construction management, commissioning and, if required, feasibility analysis, and assist in arranging finance. In the field of Performance Enhancement, their services include various types of technical audit, quality control, inventory control and safety. In the field of Advisory Services consulting engineers can be engaged to give professional engineering advice in addition to other services. They can be engaged for the engineering knowledge, experience and judgment to give a professional opinion on management, valuation, production, inspection, testing and quality control. He, therefore, submitted that the activity of the appellant was within the scope of the definition of "consulting engineer". As regards the software, he submitted that having Page 0082 regard to the nature of service given in the context of software and up gradation it was not a case of mere sale of goods. He referred to various clauses of the agreement including Clauses 1.7, 1.13, 3.1, 5, 13.7 read with Appendices 1 to VI showing break-up of various services, 2.1.1 and 5.1.1 Appendices in support of his submission that the services rendered by the appellant fell within the definition of "consulting engineer" services. He submitted that the circular regarding exemption of software services did not apply to the appellant because it was issued on 7.10.2005, and cannot relate back to the period covered under the show cause notice. Referring to the decision of the Madras High Court in V. Shanmughavel (DR) v. CCE Chennai-II , he pointed out that it was held therein that, when an engineer becomes a registered valuer of immovable property or plant or machinery, he was rendering the services as a consulting engineer. He also submitted that before the original authority the appellant never objected to the jurisdiction of the authority in reply to the show cause notice and, therefore, having acquiesced in the jurisdiction of the departmental authority, the appellant was estopped from challenging it before the appellate forum. He relied on the decision of the Tribunal in Sangameshwar Pipe & Steel Traders v. Commissioner of Central Excise, Belgaum reported in 2001 (141) ELT 252 (T), in support of this contention. He further submitted that services rendered for upgrading software and to ensure that it properly works, cannot be said to be sale of goods and was different from the sale of software as goods. He pointed out our attention to the decision of the Kerala High Court in Escotal Mobile Communications Ltd. v. Union of India reported in 2004 (177) ELT 99 (Ker.), in which the High Court held that selling of the SIM card and the process of activation were services provided by the Mobile Cellular Telephone Companies to the subscriber and squarely fall within the definition of "taxable service" as defined in Section 65(72) (b) of the Finance Act, 1994. Relying upon the decision of the Supreme Court in Mafatlal Industries Ltd. v. Union of India , he submitted that even if the authority under the Act holds erroneously, while

exercising its jurisdiction and powers under the Act that a transaction is taxable, it cannot be said that the decision of the authority was without jurisdiction, because whether or not a transaction was exigible to tax was a matter to be determined by the authority under the Act. He supported the reasoning and the findings of the authorities below and submitted that the services rendered by the appellant clearly fall within the ambit of "consultant engineer".

Reasons:

6. Though in reply to the show cause notice the jurisdiction of the authority was not challenged, in the appeal before the Commissioner the appellants had challenged the order-in-original, inter alia, on the ground that it had been passed without jurisdiction. The Commissioner (Appeals) taking note Page 0083 of the provisions of Rule 4, which provided that a service provider providing a taxable service from more than one premises or offices and having a centralized billing system, in respect of such service rendered to their clients from such premises or offices, at any one premises or office, may opt for registration of only the premises or office from where such centralized billing is done. It was noted that the appellant were having their office at Commercial Plaza. Radisson Complex, National Highway No. 8, New Delhi, which at the relevant time was under the jurisdiction of Delhi-I Commissionerate and the authority who had issued the show cause notice was working in that Commissionerate, and the issuing authority of show cause notice was the proper officer since the area of the appellant's premises was within his jurisdiction. Likewise, the Additional Commissioner of Central Excise Commissionerate, Delhi-II was the proper officer to decide the case of the assessee, which was falling under the Central Excise Commissionerate, Delhi-II after the bifurcation of Delhi-I Commissionerate into Delhi-I and II w.e.f. November 2002. The Commissioner (Appeals) also negatived the contention of the appellant, that the order-in-original made by the Additional Commissioner was without jurisdiction since Section 73 of the said Act empowered only the Assistant Commissioner/Deputy Commissioner to make such order as the appropriate authority, on the ground that Section 12E of the Central Excise Act, which was made applicable to the matters relating to service tax by virtue of Section 83 of the said Finance Act, 1994, empowered a Central Excise Officer to exercise the powers and discharge the duties of any other Central Excise officer subordinate to that authority. It was also held that the circular No. 75/7/2004-ST dated 3.3.2004, on which reliance was placed, did not override the provisions of Section 12E of the Central Excise Act, as made applicable to like matters Tax by Section 83 of the Finance Act, 1944.

6.1 Under Rule 4(2) of the Service Tax Rules, 1994, it has been provided that "where an assessee is providing a taxable service from more than one premises or offices and has a centralized billing system in respect of such service rendered to clients from such premises or offices at any one premises or office, he may opt for registering only the premises or office from where such centralized billing is done". Under Sub-rule (3) of Rule 4, an assessee providing a taxable service from more than one premises or offices, and having any centralized billing system, was required to make separate applications for registration in respect of each such premises or offices to the Superintendent of Central Excise. The fact that an assessee providing a taxable service from more than one premises or office and having a centralized billing in respect of the services rendered to clients was given an option for registering only the premises or office from where such centralized billing is done, is a clear pointer to the recognization of the power of the authority within whose

jurisdictional area such premises or office from where a centralized billing is done is situated. In the present case, admittedly, the centralized billing was being done from the premises or offices within the jurisdiction of the authorities that had issued the show cause notice and decided the proceedings by making the order in original. Page 0084 Furthermore, when no application is made for registration as per Section 69 of the Act, read with Rule 4(2) of the rules framed thereunder, the jurisdiction of the authority to detect and issue show cause notice to an assessee whose centralized billing premises fall within his jurisdiction, will not he taken away. Admittedly, there was no application for registration made by the appellant in respect of any of the premises or offices from which services were allegedly rendered including the premises or offices from where centralized billing was done. The Commissioner (Appeals) has, therefore, rightly observed that the law gives facility for decentralized registration to those who come forward for registering themselves voluntarily, but the law does not give such facility to a person not coming forward for registration and when caught and show caused, and such person cannot by exercising the option of decentralized registration ask for show cause notices to be issued by various offices under whose jurisdiction the service provided falls. By the fact that there is a centralized billing system of dues, the appellant cannot be allowed to gain such an unfair advantage having defied the law by not applying for registration before the concerned authorities under whose jurisdiction services are provided nor before the authorities under whose jurisdiction the centralized billing is done. Admittedly, the appellant had subsequently exercised the option for centralized registration on the ground of centralized billing of all its services. When no decentralized registration was at all done, jurisdiction of the authority to detect and proceed against the assessee who was having its premises from where centralized billing was done within the area of his jurisdiction to detect and initiate proceedings against the defaulting assessee, remained intact.

6.2 Furthermore, the record reveals, without any dispute on the part of the appellant, that the registered office of the appellant was situated within the Delhi Commissionerate area, that, the agreement for rendering service was executed within the jurisdiction of that Commissionerate and that, the services were being provided from their office at Delhi. Technical Support Agreement between Facel Ltd. and the appellant which was entered into on 2.6.96, shows that the principal office of Nokia Telecommunications Pvt. Ltd. who was the supplier, was in New Delhi. Under Article 13.8 of the said agreement produced by the appellant on record, all notices, demands and other communications were required to be addressed to the supplier Nokia Telecommunications Pvt. Ltd. at their New Delhi address with a copy to Nokia Telecommunication Oy, Finland. From Appendix II "Scope of Services", attached with the agreement, it transpires that the in Clause 1.1 relating to standard Help Desk services, it was stipulated that the purchaser had to contact the supplier to obtain an answer to any reasonable non-urgent query 8 hours day, "Monday through Friday, Public holidays" of New Delhi excluded, which indicates that the Help Desk services were provided from Delhi. Even the hardware repair services were provided from Delhi as is clear from Clause 5.1.1 of the said Appendix II to the agreement in which it was provided that, "in case of any failure or malfunction discovered, the maintenance team, shall identify the problem, replace the faulty product Page 0085 with a spare unit and ship at purchaser's cost to the supplier's designated premises in New Delhi for repair". In Clause 5.3.1 of Appendix II, it was stipulated that supplier shall effect repair/replacement of the faulty products and despatch the same to the purchaser within a period not exceeding eight weeks from the date of receipt of each faulty product accompanied by

fault report form appropriately filled out at its customers' services center in New Delhi. This clause shows that the customers service center of the appellant was in New Delhi and not at the places where the services were received. Clause 5.3.5 provided that repair warranty for the repaired product shall be for the period of six months and one week from the date of despatch from New Delhi of the product to the purchaser.

6.3 It is thus clear that not only the registered office of the appellant was in New Delhi, the agreement was entered into in New Delhi, as also the centralized billing was done from the registered premises of the appellant at Delhi. Even the customer services were being provided under the agreement from Delhi. Therefore, there is absolutely no substance in the contention canvassed on behalf of the appellant that the Delhi Commissionerate had no jurisdiction to issue the show cause notice and make the order in original.

7. It has been contended on behalf of the appellant that the appellant company is not a consulting engineer within the meaning of its definition under Section 65(18) of the Act, because being a company, it cannot be said to be a professionally qualified engineer or an engineering firm. As per the definition of "consulting engineer" under Section 65(18), a consulting engineer is "any professionally qualified engineer or an engineering firm who, either directly or indirectly, renders any advice, consultancy or technical assistance in any manner to a client in one or more disciplines of engineering". The expression "taxable service" in the context of a consulting engineer as defined by Section 65(72)(g) means "any service provided to a client by a consulting engineer in relation to advice, consultancy or technical assistance in any manner in one or more disciplines of engineering". The Karnataka High Court in Tata Consultancy Services v. Union of India (supra) while considering the definition of "consulting engineer", held that there was nothing repugnant in the subject or context of the Act which should prevent the inclusion of a company for purpose of levy of service tax on any advice, consultancy or technical assistance provided by it to its clients in regard to one or more disciplines of engineering. In paragraph 6 of the judgment, it was observed that the liability to pay the levy was not confined only to individuals and that levy falls on every "person" providing the service. It was held that the expression "every person" occurring in Section 68(1) was wide enough to include a company incorporated under the Companies Act. The High Court, therefore, held that the view taken by the Additional Commissioner of Central Excise that the company was liable to pay service Page 0086 tax, cannot be found fault with. The ratio of this decision was followed in M.N. Dastur & Company (supra) by the Calcutta High Court and it was held, in paragraph 15 of the judgment, that when an engineer gives his advice or when engineers form the association or firm or company consisting of engineers rendering their services as consulting engineers within the meaning of Section 65(72)(g) of the Finance Act, 1994, they will attract the definition of "consulting engineer", whether it is an individual or a firm or a company. The decisions of the High Court of Karnataka in Tata Consultancy Services and High Court of Calcutta in M.N. Dastur and Company Ltd. were followed by the Tribunal in Transweigh (India) Ltd. v. CCE Mumbai (supra) and the Tribunal held that the Act did not make any distinction between different categories of service providers, be they individuals, partnership concerns or incorporated companies. It will also be noticed that while defining offences by companies under Section 81 of the Finance Act, 1994, as it existed at the relevant time in the explanation thereto, it was provided that for the purpose of that Section "company" means any body corporate and included a firm or other

association of individuals.

7.1 There can be no doubt that professional qualifications can be acquired only by an individual as an engineer. An engineer can start his private and sole professional venture as a consulting engineer or there can be an engineering firm. The word "firm" does not appear to have been used in the definition clause of "consulting engineer" only in the sense of a partnership firm. The word "firm" has a wider connotation than a mere partnership firm. The firm in its wider sense would mean a business concern. Therefore, where a company, which is a juristic person, directly or indirectly renders any advice, consultancy or technical assistance in any manner to a client by engaging professionally qualified engineer/engineers in any discipline of engineering, such company would be rendering taxable service as a consulting engineer for the purposes of this Act. Any other interpretation would make the provision open to abuse in cases where the company provides services to its clients by engaging qualified engineers as employees because in such a case the privity of contract is between the company providing the services and the clients wanting them under the contract. Even the Board's circular No. 43/5/97-TRU dated 2.7.97 has clarified that the word "firm" would include a company. There is, therefore, no substance in the contention raised on behalf of the appellants that the appellant being a company incorporated under the Companies Act and not a firm, cannot be a consulting engineer within the meaning of Section 65(18) which defines "consulting engineer".

8. For the purpose of ascertaining whether the services provided by the appellant were of consulting engineer and, therefore, taxable service under the Act, the terms and conditions of the contract under which the services are provided are required to be considered. According to the appellant, Page 0087 none of the services provided by the appellant were of advisory or consultative nature and that the expression "technical assistance" has to be read in the context of consultation and advice that a consulting engineer would give. It was argued that only cerebral activity of the professional was contemplated in the definition of "consulting engineer" and that, implementation of the advice and advisory technical assistance were independent of the consultative advisory process and, therefore, did not fall within the definition of "consulting engineer". It is difficult to visualize the role of a consulting engineer with such rigidity as is canvassed. The Consulting Engineers Association of India in their Member Directory 2000, which is produced on record by the appellant company, have indicated as to what consulting engineers can do. Particulars given therein as regards the services provided by consulting engineers indicate that consulting engineers offer abroad spectrum of services ranging from sector studies to evaluation of proposals and the design and monitoring of construction of projects. They offer expertise in over 25 major areas of specialization and provide 40 different kinds of services. The services of consulting engineers are divided in several broad categories, namely, pre-investment studies, design and supervision services for construction of works, design and development services, project management, commissioning assistance, project transition, performance enhancement, advisory services etc. The project implementation undertaken by consulting firms would include supervision of project execution, assistance in project operation for an initial period, execution of training programmes, and institution building or financial studies for the successful implementation of projects. The duties of consulting engineering firms would depend upon the circumstances in each case and they may include pre-investment studies, detailed engineering and design and project implementation.

Computer software engineers apply the principles and techniques of computer science, engineering and mathematical analysis to the design, development, testing, and evaluation of the software and systems that enable computers to perform their many applications. Software engineers working in applications or systems development analyze users' needs and design, construct, test and maintain computer applications software or systems. They solve technical problems that arise. Software engineers analyze users' needs and design, construct, and maintain general computer applications software or specialized utility programmes. Software engineers co-ordinate the construction and maintenance of a company's computer systems and plan their future growth. Working with a company, they coordinate each department's computer needs- ordering, inventory, billing, and payroll record keeping, for example-and make suggestions about its technical direction. Software engineers work for companies that configure, implement and install complete computer systems. They may be members of the marketing or sales staff, serving as primary technical resource for sales workers and customers. They may also be involved in product sales and in providing their customers with continuing technical support. Computer software engineers design new hardware, software and systems that controls the computer. The work of computer hardware engineer is similar to that of Page 0088 electronic engineers, but unlike electronics engineers, computer hardware engineers work exclusively with computers and computer related equipment. In addition to design and development duties, computer hardware engineers may supervise the manufacture and installation of computers and computer related equipment, The rapid advances in computer technology are largely a result of the research, development, and design efforts of computer hardware engineers who must continually update their knowledge.

8.1 It will thus, be clear that services rendered by software engineers is altogether a different thing from mere sale of software as goods, as may be available when it is provided on a compact disk. Rendering software engineering services is altogether a different thing from selling software as goods, and therefore, it cannot be urged that rendering of services as software engineers should be treated as supply of software goods. Therefore, the decisions dealing with supply of software as goods will have no application where software engineer's services are provided under a contract by the consulting engineer.

8.2 As regards "installation, erection and commissioning", the Commissioner (Appeals) relying upon the Government of India circular No. 79/9/2004-ST dated 13.5.2004 has held that the services were rendered outside the purview of the category of consulting engineering services, and reduced the demand of service tax on the consideration billed, "for goods and sold and on the consideration for installation, erection and commissioning of the telecommunication equipment", from Rs. 7,03,10,717/-to Rs. 3,40,63,905/- and also reduced the penalty from Rs. 14 crores to Rs. 3,40,63,905/-. Therefore, there is no scope for the appellant to argue for reducing any amount under the head of "goods supplied" and "erection, installation and commissioning" of the telecommunication equipment.

9. In the break-up given by the appellant before the Commissioner (Appeals), there were two items described as "unexplained" of Rs. 8,16,46,525/- and "others", of Rs. 3,18,79,965/- billed by the appellant for its services. The Commissioner (Appeals) found that these amounts pertained to charges under Help Desk, operation and maintenance and emergency support, technical

consultancy etc. These were, therefore, held to be in the nature of providing technical assistance and hence chargeable to service tax.

10. As per the Notification No. 223/97-ST dated 2.7.97 issued under Section 66(3) of the Act, service tax at the rate 5% of the value of taxable services was levied on consulting engineer w.e.f 7.7.97. As per Clause (f) of Section 67 of the Act, the value of taxable services in relation to service provided by consulting engineer to a client, shall be the gross amount charged by such engineer from the clients for advice, consultancy or technical assistance in any manner to a client in one or more disciplines of engineering. The Central Board of Excise & Customs had elaborated on the nature and scope of the services provided by consulting engineers in circular F.No. B-43/5/97-TRU dated 2.7.97, based on which the Delhi Commissioner had issued a trade notice No. 53-CE(ST) dated 4.7.97 Page 0089 in which certain clarifications regarding service tax on consultancy services in engineering were given. It was clarified therein that consulting engineers shall include self-employed, professionally qualified engineer who may or may not have employed others to assist him or it could be an engineering firm whether organized as a sole proprietorship, partnership, a private or a public limited company. The circular and the trade notice illustrated wide scope and nature of the service provided by consulting engineer which includes feasibility study, pre-design engineering service/project report, basic design engineering, detailed design engineering, procurement, construction supervision and project management, supervision of commissioning and initial operation, manpower planning and training, post-operation and management, trouble shooting and technical services, including establishing systems and procedures for an existing plant.

11. It will be interesting to note that in the legal opinion obtained on 28.8.98 by the appellant, on which reliance was placed during the proceedings, and a copy of which is placed on record. It was stated in paragraph 1.4 of the "legal opinion" that the scope of the term "consulting engineer" was explained by the circular letter F.No. B.43/5/97-TRU dated 2.7.97. After setting out the contents of the circular, it is stated in paragraph 1.4.1 of the opinion, that from an analysis of the specimen services contract, it appeared that a substantial portion of the services to be rendered by the querist, i.e., the appellant included installation, inspection, testing, commissioning and technical support. It was stated: "such services would, in our opinion, prima facie be covered within the definition of taxable services as described in the circular dated 2.7.97 (supra) issued by the Tax Research Unit". It was, however, stated that these services would be taxable services if rendered by a consulting engineer, i.e., by a professionally qualified engineer or an engineering firm. As per that opinion consulting engineer in the ordinary course of the term refers to those engineers or engineering firms engaged in engineering consultancy and similar activities of advisory nature and does not include in its ambit engineers engaged by a company or firm in the process of manufacture and sale of goods. It was opined in answer to the query of the appellant that "the querist being a private limited company and not a firm, would not, in the opinion of the present consultant, be liable to collect and pay service tax, as a consulting engineer even though the services rendered by the querist, are, from a perusal of the specimen services contract, in the nature of technical or consultancy services, in the disciplines of engineering. For the reasons that we have set hereinabove and as per the settled legal position the corporate body rendering services as consulting engineers would fall within the ambit of the definition of "consulting engineers" under Section 65(18) of the said Act".

12. In order to ascertain the nature of services rendered by the appellant to its customers, it would be proper to examine the terms and conditions of such agreements. In his statement dated 7.2.2001 given by the Financial Controller of the appellant had stated that the customers of the Page 0090 appellant were BPL Cellular Ltd., Tata Cellular Ltd., Skycell, Spice Cell, Facel, and others. The customers purchased the cellular equipment directly from Nokia Networks Oy Finland. There were contracts between the customers and Nokia India, for implementation and commissioning of the equipment. According to him, those were service contracts. A copy of the contract with Facel was enclosed with the statement. He stated that "the equipment was implemented and commissioned by qualified engineers who were the employees of the appellant". Most of the engineers were degree holders as stated by him. According to him as per the service contract, the main services being provided by the appellant were of installing and commissioning, including system design, installation, supervision, training of operation engineers, consultancy and technical assistance services. He further stated that the customers entered into a technical support agreement for maintenance of the equipment purchased from Nokia Networks Oy. Whenever the customer was faced -with a problem in the equipment, the Help Desk of the appellant received a call and a qualified engineer was directed to it. The engineer would suggest a remedy which if did DOC work, the engineer visited the premises of the appellant to rectify the fault. As per the show cause notice dated 11.4.2002, the appellant had collected Rs. 75,82,78,764/- during the period from 7.7.87 to December 2000 on which service tax at the rate of 5% was required to be paid. Returns were filed under Section 70 for the said period by the appellant showing the said value of taxable service and the amount of service tax. In their reply to the show cause notice dated 8.5.2002, it was, inter alia, stated that all activities provided under implementation services, were performed by personnel specially trained for installing, commissioning and testing the equipment supplied by Nokia Finland and having experience in relation to systems installed by Nokia equipment. It was also stated that Nokia India impart a training/information to BPL personnel on the features/specifications/working of the network equipment. Some of the training was imparted at sites while some of the training was performed in formal classrooms. As a part of the training, information was also provided on the layout of the site including routing of the cables and wires. On the technical support agreement, it was stated that the basic scope of the activities envisaged in that agreement was to perform such activities for the client as may be necessary to keep the equipment and software (supplied by Nokia Finland) up and running, at all the facilities/sites of the telecom operator. The agreement provided for various situations where appellant had to execute repair and maintenance activities for its customers, which situation would arise on breakdowns and malfunctioning of equipment. According to the appellant, activities performed under the agreement included hardware repair services, software support services, operation and maintenance assistance, help desk services, etc. 12.1 The technical support agreement between Facel and the appellant indicates that it was entered into with a view to provide technical support services as defined thereunder for the equipment. Services which were to be provided were defined in Article 1.7 to mean the system design, Page 0091 installation, supervision, training, consultancy and technical assistance services that the supplier was required to provide to the purchaser under the services contract as defined. The special services contract as defined under Article 1.8 meant the contract for the provision of the services for the system signed by the supplier and the purchaser. The system was the digital cellular mobile telephone network or a part thereof conforming to the GSM recommendations operated by the purchaser. The expression "technical support" services was defined under Article 1.13 so as to mean the technical support

services ordered by the purchaser under the said agreement in Appendices 1A and 2 attached thereto to be performed by the supplier, i.e., the appellant, pursuant to the technical support agreement. The prices of the technical support services were listed in its Appendix I. The technical support services offered by the appellant pursuant to the said agreement consisted of fixed types of services described in Appendix 2 and mentioned in Article 3.1 were:

(1) Hardware repair service;

(2) Operation and maintenance assistance service;

(3) Software support service;

(4) Standard help desk services;

(5) Emergency support services;

(6) System Consultancy Service 12.2 Under Article 4 of the said technical support agreement, the initial order of the purchaser for the technical support services was attached as Appendix 1A, which was a confirmed order. It was also provided that the purchaser may order additional technical support services of the nature specified in Appendices 1B and 2. Under Article 5.2, it was stipulated that the purchaser shall pay the fixed annual fees for the technical support services, as defined in the prices of the services described in Appendix 1A. by quarterly instalments in advance. The purchaser undertook to purchase the technical support services listed in paragraph 5.2 of Article 5 throughout the period ending December 31, 2005. Under Article 5.6, it was stipulated that the fees and charges indicated in Appendices 1A and 1B were valid for the configuration of the network built with the aggregate value of purchases of equipment and services amounting to US$ 40,000,000. Under Article 9.2 of the agreement it was stipulated that all prices were expressed therein exclusive of any withholding, value added or equivalent taxes and/or duties levied in India on account of sales, use and the supply of services and/or equipment thereunder. It was stated that the amount of such taxes shall be added to the prices expressed therein and shall be included in the invoice rendered by the supplier in respect of the services provided thereunder and shall be paid as part of the purchase price thereof as provided in Article 5. Under Appendix 1A, wherein the prices of services were described as stipulated in Article 5.2, it was stipulated in Clause 1 that technical support fees payable for the services specified in Clause 1.1 and 1.2. i.e., software support service and standard Help Desk service were US$ 500,000 in the first year and US$ 600,000 each year from the second year onwards till December 31, 2005. Page 0092 As per the break-up in respect of software support service in Clause 1.1 the amount was to be US$ 450,000 in the first year and US$ 500,000 each year from the second year onwards till December 31, 2005 while for the standard Help Desk service, under Clause 1.2, it was US$ 50,000 in the first year and US$ 100,000 each year from the second year onwards till December 31, 2005.

12.3 In respect of hardware repair service, it was stipulated in Clause 1 that there were no annual fees. Only the repair charges as mentioned in Clause 1.3 were to apply. Under Clause 1.3 of the said Appendix 1A relating to hardware repair service, it was provided that price for repair or replacement of the defective plug-in-unit/modules/products was 59% of the price of the new plug-in-unit/modules/products specified in Appendix 4 attached to the agreement. The said price was to apply after the expiry of the applicable warranty period.

12.4 Appendix 1B of the technical support agreement related to additional technical support services, their fees and charges. The services for the supplier technical support personnel was stipulated in Clause 1.1 per working day per person basis. The operation and maintenance assistance service covered under this clause was to be charged at US$ 750 for the first year three years and 900 US$ for the subsequent three years and for the balance period till December 31st, 2005 at the rate of 9.75 US$ per working day per person. Accommodation and expenses were to be invoiced and paid in addition to the said service fee in accordance with the actually incurred amounts. Overtime was to be charged separately on an hourly rate equal to 18.75% of the daily fee. These prices were based on normal working hours and days, and the Bank and Public Holidays and Sundays were excluded.

12.5 Annual basic fee of US$ 50,000 per annum was stipulated for emergency support service under Clause 1.2 of Appendix 1B. The service fee for the call-out services of the supplier's technical support personnel, as specified in Sub-clause 2.2.2 of Appendix 2, was US$ 1500 per day per person including traveling days. Call-out fees were not to be charged in case the support could be provided without actual visit to the relevant site.

12.6 The system consultancy service was to be paid, as per Clause 1.3 of Appendix 1B, at the rate of 1030 US$ for the first three years and 1240 for the subsequent three years and 1345 US$ for the balance period till December 31st, 2005 per day per person.

12.7 Appendix 2 of the agreement provided for the scope of services. Under Clause 1 thereof, it was, inter alia, provided that the purchaser had contacted the supplier to obtain an answer to any reasonable non-urgent query, eight hours day, Monday through Friday, Public holidays of New Delhi excluded. These queries were to relate to the in-service support of systems in the purchaser's network covered by the agreement. The appellant was to provide alternative points of contact for the Help Desk service on weekends i.e. Saturdays and Sundays. At the request of the purchaser, the appellant would give service from customer Help Desk by Page 0093 using remote access facilities via dial-up modem or X.25 connected to the equipment. The purchaser was required to have the necessary equipment to provide a remote access diagnostic session from the supplier's support center, i.e., the appellant's support center. In Clause 1.3 of the standard help desk services, it was provided that there were two levels of expertise involving the problem solving process. The customer service level ensured that all needed data was gathered from the customer and checked-whether the problem was already known and could be found from the Nokia Resolution Database. If further expertise was needed, customer's support representative referred the request to first available system support engineer. The support engineer was then responsible to bring it to a satisfactory solution. For the most difficult product problems the appellant had to internally call upon effective backup support from the research and developments.

12.8 As provided by Clause 2 of Appendix 2 of the technical support agreement which related to emergency support services, the supplier i.e, the appellant undertook to provide, on a twenty four hour, year round basis, an emergency support service for the NSS and BSCs only in the network as indicated. In Clause 2.2, scope of emergency support service was set out as per which upon receipt of request by the purchaser, supplier was required to respond within sixty minutes, by telephoning the number as manually defined. The purchaser was to telefax all agreed relevant data to the supplier's service center and thereafter the supplier's expert was required to use reasonable efforts to provide the purchaser with recommendations, so that the fault/problem can be located and/or remedied. It was stipulated that the appellant shall use its reasonable efforts to give recommendation within three hours of the problem/fault notification by the purchaser. As regards on site service, it was stipulated in Clause 2.2.2 that at any time during a call-up the purchaser may request the supplier, i.e., the appellant to send a system expert to site, to provide on site services (call-out). The appellant was required to use its reasonable efforts to have the system expert on the site as soon as possible. On arrival at the site the system expert of the appellant was to assist the purchaser in the manner indicated in Clause 2.2.2.4 by analyzing the fault situation and advising the purchaser's staff accordingly. He was required to consult with the purchaser's staff concerning actions to be taken to rectify and/or improve the situation. A call out i.e. site service provided by the appellant by sending system expert was to be terminated only on successful rectification of the fault or completion of mutually agreed improvement of the situation or by mutual agreement that no further action could be taken as stipulated in Clause 2.2.2.4.5 12.9 Clause 3 of Appendix 2 described the software support service as provided by the appellant. The software support service concerned all equipment within the GSM system manufactured by or on behalf of the supplier and delivered to the purchaser by the supplier. The software produced by third parties was not covered by the software support service. The scope of software support service as per Clause 3.2 included separation Page 0094 of software corrections to rectify the faults received in the fault report form from the purchaser. A software report describing the faults found, the corrective actions to repair the faults, and content of next software update was to be published in three months' period. The appellant was required to collect a number of software corrections together and publish them as an update of the delivered software release. The software update was mainly to include improvements and corrections of faults of the existing software release.

12.10 The appellant had a right to include into the software-update also new features if they required only small modifications in the software. The appellant had undertaken to keep an updated version of the system software and documentation of the supplier's customer service center in India. The new software update including documentation modifications were to be saved into the software library of the appellant. The delivery of the software update was to take place only if the purchaser decided to take the new software. Installation of the software into the purchaser's equipment was to be done by the purchaser's personnel. At the purchaser's request, the appellant-supplier was to carry out the production and delivery of the software update at the price agreed in Appendix 1, Sub-section 1.1. Again, at the purchaser's request, the appellant-supplier was to carry out the installation of the software update into purchaser's equipment under the terms of operation and maintenance assistance service, if so ordered by the purchaser.

12.11 As regards access to new software releases, it was, inter alia, provided under Clause 3.3, that software releases included typically major improvements in the software and by choosing the software support service the purchaser was entitled to get the new software releases, free of additional charges. However, the future supplementary GSM services and other new, optional add-on features were to be priced separately. It was stipulated in Clause 3.3.9 that in case, the purchaser decided not to take the new software release, the software support service fee automatically increased by ten percent of the price for software support fee defined in Appendix 1, Section 1.1. The new price was to become effective six months after the publishing date of the new software release. It will thus be seen that new software release was to be supplied by the appellant free of additional charges and if the purchaser decided not to take the new software support service release, fee was to be raised by 10%. There was, therefore, no question of sale of software as goods. Under Clause 3.3.12, the new software release was tested at the appellant's test-bed facilities at CSC-Delhi and/or other customer service centres.

12.12 The operation and maintenance assistance service was described in Clause 4 and this support service concerned all equipment and software within the GSM system delivered by the appellant or its affiliates. As per the scope of temporary maintenance assistance service at the purchaser's request, the appellant was to assist and consult the purchaser's staff to operate and maintain the system(s) at the site(s) and if operational problem was not located by the maintenance team of the purchaser, despite best Page 0095 efforts, maintenance service was to be performed at the site(s) and the appellant had under Clause 4.2.3 agreed to send to the site (s), upon the purchaser's request, an expert as per the lead-time matrix indicated to perform the services. Under Clause 4.2.5, the appellant was required to provide technical support services until the predefined tasks had been performed or until the disappearance of the failure and/or the restart of the system or sub-system.

13. Clause 5 of the said Appendix 2 describes hardware repair service which concerned plug-in units and sub-units with the GSM equipment manufactured by or on behalf of the appellant and delivered to the purchaser by the appellant. The said Clause 5 describes the hardware repair-service of plug-in units modules and products as provided by the appellant. The scope of repair service of plug-in units/modules/products described in Clause 5.3 provided that the appellant shall effect a repair/replacement of the faulty products and despatch the same to the purchaser within a period not exceeding eight weeks from the date of the receipt of the faulty product at its customer services center in New Delhi. The appellant was required to deliver to the purchaser twice a year, a repair report containing information about fault types, amount of units and sub-units repaired, and replacement periods. The repair warranty for the repaired product was to be for six months and one week from the dale of despatch from New Delhi of the product to the purchaser. Clause 6 of Appendix 2 related to system consultancy service under which the appellant undertook to help the purchaser for enhancing the system used by the purchaser in the network.

14. It will be noticed from the aforesaid stipulations contained in the technical support agreement that the appellant had agreed to provide services of expert engineers in respect of the telecommunications infrastructure equipment delivered to the purchaser by Nokia Telecommunication Oy as per the technical support agreement entered into between the purchaser and the appellant. The prices which were stipulated were in respect of the services which were to be

provided, and these services were clearly rendered through the qualified engineers. The scope of software support service was not of just selling readymade software but the service in that field was rendered on the basis of the fault report forms received from the purchaser on the basis of which the appellant was required to prepare software corrections, to rectify the faults and prepare reports and make software update. Therefore, rendering of software support service of the nature stipulated in this agreement, cannot be equated with the sale of software goods. The decision of the Apex Court in Tata Consultancy Services v. State of Andhra Pradesh (supra) rendered in the context of sale of software can, therefore, have no application to the nature of software support service rendered under the terms of this agreement.

15. The contention that the software support service was exempted, and therefore no tax could have been levied is based on the Notification No. 4/99-ST dated 28.2.99 which provided that, in the exercise of the powers conferred by Section 93 of the Finance Act, 1994, the Central Government, being satisfied that it was necessary in the public interest Page 0096 so to do, exempted the taxable service provided to any person by a consulting engineer in relation to computer software from the whole of the service tax leviable thereon under Section 66 of the said Act. In the present case, the show cause notice dated 11.4.2002 was issued in respect of the value of taxable service for the period from 1.7.97 to December 2000. Therefore, even on the basis of this notification the exemption was not attracted for the period prior to 28.2.99. The notification contemplated the said taxable service from being exempted from 28.2.99. Therefore, for the period from 28.2.99 upto December 2000 the value of texable service only to the extent that it related to software support service, was required to be computed and service tax thereon was required to be reduced in view of this notification while confirming the rest of the demand in respect of software service rendered by the consulting engineer. The clarificatory circular No. 70/19/2003-ST dated 17.12.2003 on which reliance was sought to be placed for claiming exemption only clarifies that maintenance of software was not chargeable to service tax in the context of the notification issued on 28.2.99 and has no effect of granting exemption for any period prior to the date of the notification No. 4/99-ST dated 28.2.99 under which taxable service provided by consulting engineer to any person in relation to computer software was exempted.

16. Reliance was placed on the circular dated 13.5.2004 in which it was stated that charges for erection, installation and commissioning were not covered under the category of consulting engineer services. Commissioning or installation service was to be separately taxable under the relevant entry and they were not chargeable under consulting engineer services. The earlier clarification issued under circular No. 49/11/2002-ST dated 18.12.2002 was accordingly modified. In that earlier circular dated 18.12.2002 in the context of which modification was issued by the circular dated 13.5.2004, it was declared that the work of erection and commissioning of machineries and plants was one of providing technical assistance to buyer of machinery, and was therefore in the nature of services provided by a consulting engineer and hence taxable. In the opening part of the said circular, reference was made to Section 65(2) of the Finance Act, 1994 defining consulting engineer in paragraph 2. Further reference was made to construction agencies which took up turnkey projects for construction of flats, administrative buildings etc. The said circular was issued in the context of representation received to the effect that, in respect of turnkey contracts for carrying out construction activities, the designing and drawing work, was a service

provided to themselves in the course of the construction activity and therefore, there was no question of charging any service tax. That issue was examined by the Board and it was observed in paragraph 3 of that circular that for any civil construction work to commence, a lot of preparatory work was required, as e.g soil testing, survey, planning, designing, drawing, etc. Once the design and drawings are completed by the construction company, it always sought the approval of the client Page 0097 before proceeding with the construction. It was also observed that if the client suggested some changes they were incorporated in the design. That portion of work was provided to its clients and the service was held to be of a consulting engineer and hence taxable. It was in this context that clarification was issued on 13.5.2004 that charges for erection, installation and commissioning of such work were not covered under the category of consulting engineer service. However, the Commissioner (Appeals) observed in the impugned order that as regards the imposition of service tax on the services of installation, erection and commissioning, the circular No. 79/9/2004-ST dated 13.5.2004 has rendered these services outside the purview of the category of consulting engineering services, and dropped the demand of service tax confirmed on account of installation, erection and commissioning. We are, therefore, not concerned in this appeal with installation, erection and commissioning services rendered by the appellant.

17. Maintenance or repair services rendered under contracts entered into prior to 1.7.2003 were exempted from service tax if the bills were raised and payment also made prior to 1.7.2003 by virtue of Notification No. 11/2003-ST dated 20.6.2003. In this context a doubt was raised as to whether service tax would still be chargeable in cases where bills were raised or payments made after 1.7.2003, but the services were rendered prior to 1.7.2003. It was declared by the circular No. 62/11/2003-ST dated 21.8.2003, that any maintenance or repair service rendered prior to 1.7.2003 will not be taxable, irrespective of when the bills were raised or payment made. The appellant has tried to contend that software support, O&M assistance, Help Desk, and emergency support were repair and maintenance services. This contention has been negatived by the Commissioner (Appeals). By merely describing the services as maintenance and repair services, they will not become such service. Having regard to the nature of the software support service, operation and maintenance assistance, help desk service and emergency support services as reflected from the technical support agreement and its appendices which we have referred to hereinabove, it becomes at once clear that the services which were provided by the appellant under the said agreement were consulting engineer services and were not merely maintenance and repair services properly so called. Nature of services under the aforesaid stipulations was merely advisory, consultative, and of rendering technical assistance to the purchaser. At is only the hardware repair service covered by Section 5 of Appendix 2 which may attract its exemption. As noted above, hardware repair service concerned all plug-in units and sub-units within the GSM equipment manufactured by or on behalf of the supplier and delivered to the purchaser by the supplier. In such cases the faulty product was to be sent to the designated premises in New Delhi for repair. The appellant was required to effect the repair/replacement of the faulty product and despatch it to the purchaser. Only in respect of such hardware repair service an exemption could be claimed under the said notification and not in respect of other services such as software support services, operational and maintenance assistance, help desk services and emergency support Page 0098 services. As per the break-up which was given by the appellant before the Commissioner (Appeals) hardware repair services, as mentioned in the Table were of the value of Rs. 8,40,74,649/-. The Commissioner (Appeals) appears to have

straightaway relied upon the break-up given by the appellant without verifying the nature of hardware repairs, namely, whether it is fell within the scope of hardware repair service under Section 5 of Appendix 2 to the agreement which narrated the scope of services. The Commissioner (Appeals) will, therefore, verify as to what amount of the value of hardware services is covered under Section 5 of Appendix 2 to the agreement and reduce only that much amount which was proved to have been paid towards the hardware repair service, as contemplated in Section 5 of Appendix 2.

17.1 In respect of the hardware repair service, Appendix 1A of the agreement provided that, there would be no annual fees, but only repair charges as mentioned in paragraph 1.3. The price for repair or replacement of the defective plug-in unit/modules/products was 59% of the price of the new plug-in unit/modules/products specified in Appendix 4 attached thereto. The said price applied after the expiry of the applicable warranty period. Therefore, for working out the amount of value of taxable service which was required to be reduced on account of its being hardware repair service, the Commissioner (Appeals) will have to work out, on the basis of the material that may be adduced, price for repair or replacement, as stipulated in Clause 1.3 of Appendix 1A and reduce the taxable value of service only to that extent.

18. The learned Counsel for the appellant took aid from the maxim nocitur a sociis for contending that meaning of the expression "technical assistance" occurring in the definition clause of "consulting engineer" should he confined to mere advisory or consultative assistance where purely cerebral function was involved. This would, in our opinion, be totally an unrealistic approach in the field of consultative engineering. Advice and consultation of a saint sitting under a banyan tree may mainly involve thought processes and discourses with no physical activity on the part of the saint towards assisting the recepient in the implementation of advice and, therefore, he purely a cerebral function, but that would be altogether different from the advice and consultancy of a qualified professional consultant engineer who is well versed with a discipline of engineering and has to render professional advice and consultancy to his client in respect of material objects that may require active technical assistance for making such advice and consultancy a meaningful and effective service. The expression "consultant engineer" cannot be understood so narrowly, as the learned Counsel would want us to believe in the engineering field, as is clear from the multifarious activities of consultant engineers declared by their own federation. The definition of "consultant engineer" which encompasses direct or indirect rendering of such service including technical assistance is, in our opinion, wide enough to embrace the training of personnel, software support (except for the period falling under the exemption notification dated 28.2.99, after 28.2.99), operation and maintenance services, emergency support services, technical consultancy etc. of the nature provided under Page 0099 various terms and conditions of the technical support services rendered by the appellant, and the contentions raised to the contrary by the learned Counsel for the appellant are, therefore, misconceived and cannot be accepted.

19. As per Article 9.2 of the technical support agreement, all prices expressed in the technical support agreement were exclusive of taxes and duties on the sales, use and the supply of services by the appellant. The amount of service tax was required to be added to the prices expressed in the agreement and be included in the invoice tendered by the appellant in respect of the services provided under the agreement and were to be paid as part of purchase price under Article 5 of the

agreement. Therefore, if the service tax was collected under Article 9.2 read with Article 5 of the technical support agreement by the appellant, that could have been proved by showing the invoices from which such service tax recovery could have been ascertained. If such tax is not added, and not collected by the appellant as per Article 9.2 of the technical support agreement, there can arise no question of reducing the service tax payable from the price realized by the appellant, because in such an event the tax will not be a part of such price. It appears from the impugned order that this aspect had not been urged before the Commissioner (Appeals) or examined by him. In the absence of establishing that service tax was collected separately over and above the price, as contemplated by Article 9.2, the claim of the appellant for reduction of that amount cannot be countenanced.

Final Order :

20. For the foregoing reasons, we uphold the impugned decision of the Commissioner (Appeals) subject to the following directions. The Commissioner (Appeals) will :

> (i) Reduce the taxable value of the software support service provided by the appellant under the technical support agreement to the extent that it is covered by the exemption Notification No. 4/99-ST dated 28.2.99 from 28.2.99 till December 2000.
>
> (ii) Reduce the taxable value of hardware repair service only to the extent to which it falls within the ambit of Clause 1.3 of Appendix 1A to the agreement which provided for repair and replacement of defective hardware at 59% of the price of the new plug-in unit and contemplated charging of no annual fees for such hardware service as declared in Clause 1 thereof.

20.1 The impugned order shall stand modified by effecting the reductions as directed above that may be worked out by the Commissioner(Appeals) expeditiously, preferably not later than two months from the date of this order. Subject to the above modification on the basis of which the Commissioner (Appeals) will work out the exact amount which is required to be reduced from the tax demanded and the penalty imposed, the appeal is dismissed on all other counts.

(Pronounced on 23-1-2006)