CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
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REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 77 Of 2010

[Arising out of OIO No. 23/ST/CHD-II/09 Dated 30.10.2009 passed by the Commissioner of Central Excise, Chandigarh]

General Manager Telecom, BSNL : Appellant (s)
Telephone Bhawan, Bharat Nagar, Bibi wala road, Bathinda

Vs

CCE & ST- Chandigarh : Respondent (s)
C. R. Building, Sector 17, Chandigarh

APPEARANCE:
Shri Gyanchand Babbar, Advocate for the Appellant
Ms. Shivani, Authorised Representative for the Respondent

CORAM : HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

ORDER No. A/60101/2023

Date of Hearing:17.04.2023

Date of Decision:20.04.2023

Per : S. S. GARG

The present appeal is directed against the impugned order dated 30.10.2009 passed by the Commissioner of Central Excise, Chandigarh whereby the Ld. Commissioner has confirmed the demand of service tax under Section 73 and interest under Section 75, penalty under Section 78 of the Finance Act, 1994.

2. Briefly stated the facts of the present case are that the appellant M/s Bharat Sanchar Nigam Limited, Bhatinda is a public sector undertaking engaged in providing taxable services as defined under Section 65 (105) of the Finance Act, 1994 such as telephones, leased circuits, teleprinter/speech circuits, PBX, VCC etc, and is duly registered with the Central Excise Department. The appellant is providing telecommunication service from its 133 telephone
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exchanges located in various villages/town falling within the jurisdiction of Bhatinda SSA Mansa District and the telephone bills are issued from the General Manager Office centrally even prior to 1994 which means that the assessee is already having the centralized billing and accounting system from the very beginning. The collection of the telephone bills are made through post offices, collection centers, banks etc., and therefore, the information regarding payment are generally delayed and the assessee is unable to correctly estimate, on the date of deposit, actual amount payable for any particular month or quarter, therefore, the BSNL had made the request to the Central Excise Authority for provisional payment of service tax. The permission for provisional assessment was granted by the Central Excise vide their letter dated 03.06.2005 for the period upto 31.03.2006 which was further extended for the month of March 2007. The BSNL had further applied for payment of service tax on provisional basis vide its letter dated 24.06.2008 for the year 2008-09 for which no reply was given by the Central Excise Department.

A show cause notice was issued to the appellant by the Commissioner of Central Excise, Ludhiana dated 05.06.2008 alleging short payment of Rs. 52,13,251/- under Section 73 of the Finance Act and interest under Section 75, penalty under Section 76 and 78. The appellant filed a detailed reply to the show cause notice, explaining the entire procedure being followed by the appellant in depositing the service tax month wise.

After following the due process, the Ld. Commissioner has confirmed the demand vide impugned order dated 30.10.2009. Hence, the present appeal.

3. Heard both the parties and perused the records.

4. Ld. Counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without appreciating the facts and law and also the binding judicial precedents on the same issue in the appellant's own case. He further submitted that the BSNL had already registered for centralized billing and accounting system even prior to 1994. However, at the instance of the department they had applied for centralized registration of the service tax vide letter dated 29.11.2008 and the Assistant Commissioner of Central Excise, Sangrur had intimated vide letter dated 07.08.2009 that your billing and accounting are already centralized and no individual service tax registration number has been given to the local exchanges, hence there appears no need of any further centralized registration in this regard. He further submitted that the BSNL applied for provisional payment of the service tax and the central excise department granted the permission upto 31.03.2006 and further upto March 2007 but did not respond to their request for provisional payment for 2008-2009. He further submitted that the BSNL continued to make the payment on provisional basis and the excess payment made in any particular month was being adjusted in the subsequent month and in all the excess payment was made as per the chart of payment annexed with the appeal for the period from April 2007 to March 2008 (period involved in the present dispute). He further submitted that it is clear from the chart that in every month excess payment was being made by the BSNL and was being adjusted in the subsequent month and in total Rs. 6,45,320/- was still in excess upto March 2008 and therefore there was no short payment in any month during the period involved in the present appeal. He further referred to various letter dated 18.06.2007,

18.07.2007, 09.08.2007, 12.09.2007 etc. written by the appellant intimating the department regarding the adjustment of excess amount paid by BSNL from time to time under Rule 6 (4A). He further submitted that the central excise department never objected over the adjustments nor finalized the provisional assessment. He further submitted that the period involved in the present appeal is from April 2007 to March 2008 and in other two matters from April 2008 to march 2009 where the Commissioner (Appeals) Chandigarh has accepted two appeals, appeal No. 87 of 2010 and appeal no. 263 of 2010 in favour of the BSNL setting aside the orders passed by the original authorities but in the present case it is decided against the BSNL although the same issue was involved. He also submitted that this issue of excess payment made in one month being adjusted in the next month has been considered in the case of the appellant in various cases and allowed the appeal of the appellant by setting aside the demand raised by the department. He relied upon the following decisions in support of his submissions:-

(i) Order in appeal No. 87/ST/APPL/CHD-2/2010 decided by Sh. H. K. Thakur Commissioner (Appeals), Chandigarh on the matter involving the same issue as in the present case.

(ii) Order in Appeal No. 263/ST/APPL/CHD-I/2010 passed by Sh. H. K. Thakur Commissioner (Appeal), Chandigarh on the matter involving the same issue as in the present case.

(iii) Order in Appeal No. ST/493/2007 decided by this Hon'ble Tribunal on 19.06.2009 on the same issue as involved in this case.

(iv) Order in Appeal No. 103/CE/APPL/JAL/2003 decided on 30.06.2004 by Commissioner of Appeals, Chandigarh.

(v) Order in Appeal No. ST/25/2002 decided on 2.06.2003 by this Tribunal.

(vi) Order in Appeal No. S/5-2002-MAS dated 15.10.2003 by this Tribunal having the same issue as in the present appeal.

5. On the other hand, the Ld. AR reiterated the findings of the impugned order.

6. After considering the submissions of both the parties and perusal of material on record, we find that the appellant has centralized billing and accounting system even prior to the introduction of the service tax in 1994 and they were registered with the department. Further, the appellant have taken permission from the department for provisional payment of service tax which was granted by the department upto the month of March 2007. It is an admitted fact that when the payment is made on provisional basis the amount sometime is paid in excess and sometime it may be less. The appellant has submitted the copy of the chart showing the payment made in excess during the relevant period which clearly shows that the appellant had adjusted the excess amount paid in a particular month against the liability of the subsequent month. Further, we find that it is not the case of short payment in any case but it is only an adjustment of excess amount already paid by the BSNL and hence there is no revenue loss to the department by way of adjustment nor the BSNL got undue advantage. Further, we find that the revenue has neither objected over the adjustment made from time to time nor advised the appellant any requirement of the rules. The department itself advised to the appellant that there is no need of having centralized registration when they already have centralized billing and accounting of payment system. Further, we find that in the appellant's

own case for the subsequent period, the Commissioner (appeals) has allowed the appeal of the appellant by setting aside the order passed by the lower authorities on the same facts and the department has not filed any appeal against the same and the orders of the Commissioner in the appellant's own case has attainted finality. Besides this, we find the Tribunal has also consistently held in favour of the assessee in the orders relied upon by the appellant cited (supra).

6. As far as the demand of interest and penalty is concerned when the demand of tax itself is not sustainable, the demand of interest and imposition of penalty does not survive.

7. Hence by following the ratio of the decisions cited (supra), we are of the considered view that the impugned order is not sustainable in law and is liable to be set-aside and we do so.

8. Hence, the appeal of the appellant is allowed by setting aside the impugned order.

(Pronounced on 20.04.2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

G.Y.