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

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 10487 of 2014-DB

[Arising out of Order-in-Original/Appeal No 204-2013-STC--SKS-COMMR-A--AHD dated 26.09.2013 passed by Commissioner of Service Tax-SERVICE TAX - AHMEDABAD]

Navkar Telecom **.... Appellant**
1, Tapobhumi Apts., Opp. Shantinagar Jain Temple,
Usmanpura, AHMEDABAD, GUJARAT-380013

VERSUS

Commissioner of Central Excise & ST, Ahmedabad **.... Respondent**
7 th Floor, Central Excise Bhawan, Nr. Polytechnic
CENTRAL EXCISE BHAVAN, AMBAWADI,
AHMEDABAD,GUJARAT-380015

APPEARANCE :

Shri Paritosh Gupta, Advocate for the Appellant
Shri P. Ganesan, Superintendent (AR) for the Respondent

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

DATE OF HEARING :25.08.2023
DATE OF DECISION :05.10.2023

FINAL ORDER NO. 12198/2023

RAMESH NAIR :

The issue involved in the present case is that whether the commission received against the sale of SIM card on MRP and in such MRP the commission is already included and on that MRP the principal i.e. the mobile company has discharged the service tax, whether the appellant being a commission agent is liable to pay service tax on the commission received by them from the mobile Company in the present case, M/s. Vodafone Essar Gujarat Limited.

2. Shri Paritosh Gupta, learned Counsel appearing on behalf of the appellant at the outset submits that this issue is no longer *res-integra* as the same has been considered in various judgments and held that since the mobile company itself discharged the service tax, the commission which is included in such MRP, no separate demand can be made. He placed reliance on the following judgments:-

(a) Moradabad Gas Service – 2013 (31) STR 308 (Tri. Del.)

(b) Goyal Automobiles – 2016 (43) STR 268 (Tri. Del.)

(c) Dyal Medicos – 2017(49) STR 409 (Tri. Del.)

(d) BPL Mobile Cellular Limited- 2007 (8) S.T.R. 546 (Tribunal)

(e) Bharti Hexcom Limited - 2019 (24) G.S.T.L. 588 (Tri. - Del.)

(f) Vodafone Essar - 2015-TIOL-1173-CESTAT-MUM

3. Shri P. Ganesan, learned Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. On careful consideration of the submissions made by both the sides and perusal of record we find that issue whether the dealer of SIM Card receiving commission from the mobile companies is liable to payment of service tax on such commission when admittedly the principal Mobile Companies discharged the service tax on the gross MRP received from ultimate customer. We find that since the mobile companies admittedly paid the the service tax on gross MRP out of that only commission is paid, demand on service tax is double demand on the same amount. This issue has been considered in various judgments and some of the judgments are reproduced:-

(a) In the case of Moradabad Gas Service (supra), the principle Bench of this Tribunal held as under:-

"12. The question whether the so called "sale" of SIM-cards by mobile telephone operators, needed to enable mobile telephone connection, is actually a sale or a part of the service of providing telecommunication service was disputed before the Apex Court in the case of *Idea Mobile Communications Ltd.* v. *CCE* - 2011 (23) S.T.R. 433 (S.C.). The Hon'ble Apex Court held that the transaction is one of providing service and not of sale of SIM-cards. Sale of recharge coupons also is under dispute in this case. In the case of recharge coupons the scope for dispute on this issue is much less because there is hardly any material involved in the transaction. Nevertheless for sake of convenience such transactions is being referred to as "sale" in this order as referred to by the respondents because the transaction has a colour of sale. Nothing about taxability is to be inferred by use of this word in the remaining part of this order.

13. The question as to what will be the nature of transaction when a distributor sells SIM-cards can still be a matter of dispute because distributor is not providing any telecommunication service to the customer. This issue can come up in two different types of transactions depending on the business model of the telecom operator. In some cases the distributor gets his consideration from customer at the time of sale of SIM-cards through the margin in price. In some cases the distributor gets their consideration from the telecom operator by way of commission on the transaction normally called as sale. In the case before us the second type of situation exists. Some clauses from the agreement showing General Obligations of the Franchisee and

Responsibilities of the Franchisees and procedure for payment of commission/rewards/marketing expenses as given in the agreement are reproduced below :-

"**General Obligation of the Franchisee**

9.1 The Franchisee shall maintain a suitable organisation for the Marketing and Distribution of products & services in the allocated territory from his outlet(s). The franchisee shall use its best efforts to actively provide effective services to the subscribers of the BSNL and always act in the interest of both the BSNL and its subscribers.

9.2 The BSNL may from time to time require the franchisee to carry out customers satisfaction surveys as decided by the BSNL, the cost thereof, any, will be borne by the franchisee.

9.3 The BSNL and the franchisees shall follow model rules as described. In the annexure further responsibility of Franchisee", terms and conditions and commission and incentive policy has been described which is as under :

Responsibilities of Franchisee

1.1 Franchisee will generate demand for providing services permitted by BSNL, to franchisee BSNL Franchisee will target both individual and corporation customers.

1.2 Franchisee will receive/attend and rectify complaints and provide after sale services. All forms of complaints on phone and walk in complaints (hardware related billing performance forms complaints on phone and walk in complaints related etc.) will be handled directly by Franchisee. Franchisee shall redress all possible disposals.

1.3 Franchisee will receive advertising material from BSNL for displaying them and distribution to sub-franchisee and retailers.

1.4 Franchisee will promote BSNL brands at his own cost.

1.5 Franchisee will store Sims; instruments and other telecom store.

1.6 Franchisee will prepare MIS as per BSNL format and will give to GM (Marketing), BSNL, Circle, office as per frequency specified.

1.7 Franchisee will arrange for special promotional events as per BSNL guideline at his own cost.

1.8 Franchisee will prepare list of sub-franchisee and retailers and will inform to BSNL from time to time.

1.9 Franchisee will verify the credential of new customers.

1.10 Franchisee will have to provide BSNL showroom as per BSNL's design at his own cost.

Terms and Conditions

2.1 Whenever any new products are launched, a separate communication will follow on the applicable 'commission.'

2.9 All taxes present and future, additional taxes/cesses duties etc. which may be levied by the Government/local authorities etc, will be to the franchisee account.

2.16 Franchisee shall display prominently the information prescribed by BSNL from time to time and will display a signboard of size and design decided by BSNL indicating the name and logo/Brand name of BSNL as may prescribed by the BSNL.

2.26 The franchisee will ensure then manning of its shows room at least 14 Hrs. per day (8 am to 10 pm) 7 days a week and attending complaints (8.00 am to 8.00 pm) 7 days a week.

"Commission & Incentives Policy

3.11 Basic Commission : the rate of the commission shall be same for all the franchisee in UP (West) Telecom Circle. The basic commissions for service are as follows :

(i) Cellular - (per connection) Postpaid Rs. 200/- (prepaid) Rs. 100.

(ii) in Services - As orders issued from time to time.

3.12 Commission on recharge coupons, there will be uniform commission for Recharge coupons in BSNL License area. The commission to be paid to franchisees will be 5% : 3% commission to retailers by franchisees/sub-franchisees from their own commission. Share of Commission in between franchisee and sub-franchisee will be decided mutually."

"9.6 The franchisee shall if so desired by the BSNL, make alterations, modification and install such furniture, fixture and air conditioning equipment, introduce customer care hardware including computer with UPS, Modem etc. as required and mutually agree upon the cost of such alteration renovation shall be borne exclusively by the franchisee."

"Procedure for commission/rewards/marketing expenses claim :- Franchisee will get upfront payment for basic commission, franchisee will retain the basic commission payable to them strictly as per clause 6.7 above and submit the remaining amount collected to the customer service centre, for target achievement and retention bonus due to them, for the duration which ends in the previous month. The claim should be reach the company by 5th of every month and by the 10th of every quarter end."

From the above clauses it is clear that the respondents were promoting and marketing the services of BSNL and receiving commission. Consequently the respondents were providing business auxiliary service to BSNL.

14. The question as to what is the taxable value when a telecom operator sells SIM-card of a specified Maximum Retail Price (MRP) at a discounted price to distributors and the distributor sells the cards at MRP to customers was examined by the Tribunal in the case of *BPL Mobile Cellular Limited* v. *CCE* - 2007 (8) S.T.R.546 (Tri.-Chennai). The Tribunal held that the discounted MRP price realised by *BPL Mobile Cellular Ltd.* from distributors will be the value of service to be taxed in the hands of *BPL Mobile Cellular Ltd.* This decision is affirmed by the Apex Court as reported at *Commissioner* v. *BPL Mobile Cellular Ltd.* - 2011 (24) S.T.R. J175 (S.C.). Obviously in that case service tax got restricted to the tax on discounted price at which the mobile operator was "selling" the card. In the present case of *BSNL*, tax on the full value of the card is paid undisputedly.

15. The facts of this case are being illustrated by considering sale of SIM-cards for activation of mobile service with assumed value of Rs. 500/-. BSNL issues SIM-cards costing Rs. 500/- plus service tax of Rs. 50/- to the distributor as per terms of an agreement against appropriate security. Distributor sells the card to the customer, collects Rs. 550 from customer by cheque in the name of BSNL and deposits it with BSNL. BSNL pays service tax of Rs. 50 to Govt. Out of the remaining Rs. 500 constituting the value of service rendered by BSNL, Rs. 15 is paid to the distributor. Revenue is asking service tax on this Rs. 15 from the distributor considering it as consideration for business auxiliary service rendered by distributor to BSNL in marketing the service of BSNL.

16. As explained above, BSNL is paying service on MRP of the cards and paying commission to distributors out of MRP realized. In such a situation, collecting service tax on MRP of SIM-card from BSNL and collecting service tax again on that part of the amount paid by BSNL to the distributor out of MRP realized, puts the parties to these transactions at a doubly disadvantageous position as compared to the value taxed in the case of BPL Mobile because BPL Mobile was paying tax only on the discounted price of the card and there is no evidence to show that the value of service rendered by those distributors was being subjected to tax.

17. Against the above background the prime arguments of the respondents-distributors in these case are the following :-

(i) The distributor is buying and selling SIM-cards and there is no service involved in the activity of the distributor.

(ii) BSNL has paid service tax on the entire value of Rs. 500 including Rs. 15 paid to the distributor. So there is no case for demanding service tax again on the amount of Rs. 15.

18. Some facts and relevant laws that are to be noted in this context are the following :-

(i) It is already held by the Apex Court that the essential nature of the transaction is one of providing service and not of sale of SIM-cards. In the case of SIM-cards there is at least some material involved. In the case of recharge coupons there is no material involved and it is purely a case of marketing service. If distributors are buying sim-cards from BSNL payment should be from distributor to BSNL. In the case before us tax is demanded on payments made from BSNL to distributor. In fact the source of information based on which demands are issued are Form 16A under Income Tax Act issued by BSNL to the distributors evidencing payment of commission to distributors. This is not a case where the distributors first paid for the value of the cards took possession and then sold the cards at a higher price. The argument that it is a case of buying and selling of cards appears to be raised only on the basis that there are MRPs for the cards and it is handed over to the customer against payment of such MRP. However the card by itself is of no use to the customer unless the service is activated by the Telecom Operator. So the cards have no value once it is dissociated from the service to be provided against payment made on MRP printed on the cards. So the transaction may have a colour of sale and may be referred to as "sale" by the parties to the transaction but this is essentially not a sale but a charge for service to be provided in future. Tax is demanded on services for which payments were made by BSNL to distributor.

(ii) BSNL is paying service tax for value of telecommunication service being provided by them to the customer. Revenue is demanding tax on the service provided by distributor to BSNL which is in the nature of marketing of the services of BSNL to its customers and tax is demanded under the head of "Business Auxiliary Service". Under the scheme of levy and collection of service tax there is a liability on the distributors to pay service tax to the exchequer on the service rendered by them to BSNL.

19. In the past the Tribunal has dropped such demand both for the reason that it is a case of purchase and sale of cards and for the reason that the total value of service including the value of service rendered by distributor is subjected to tax in the hands of BSNL. The first argument may not be a good argument in view of the decision of the Apex Court in the case of *Idea Mobile Communications Ltd.* v. *CCE* - 2011 (23) S.T.R. 433 (S.C.) and for the reason that the essential character of the transaction is not of sale.

20. The second argument adopted was that demanding tax on a part of such value again in the hands of the distributor amounts to double taxation. The argument that tax should not be demanded in situations where somebody else has paid tax on the taxable value of a service is not an argument that can be accepted normally. If this argument is adopted, a taxpayer "X" in a VAT chain can argue that the next person "Y" who uses the service as input will be paying tax and X need not pay tax. In a VAT chain it is difficult to identify who is the ultimate consumer who is not paying further tax. Taking the case of telecommunication service if the customer is a person who does not pay service tax on any of his activities a telecom operator cannot adopt this argument. But if the customer is an industrialist he is eligible for credit of service tax to be paid by him. So a telecom operator can adopt the argument in respect of services rendered to such customers. Such logic will make any VAT system for collecting tax unworkable. During the initial phase of levying service tax when the Cenvat credit scheme was not extended to service tax, this concept that a sub-contractor need not pay tax if the main service provider was paying tax on the value inclusive of the value of service provided by the sub-contractor was initially supported by C.B.E. & C. in circulars like the following :

(i) C.B.E. & C. Circular No. B-43/1/97-TRU, dated 6-6-1997

(ii) C.B.E. & C. Circular No. B-43/5/97-TRU, dated 2-7-1997

(iii) C.B.E. & C. Circular No. B-43/7/97-TRU, dated 11-7-1997

(iv) C.B.E. & C. Circular No. B-11/3/98-TRU, dated 7-10-1998

21. But this approach was changed with effect from 23-8-2007 when Circular No. 96/7/2007-S.T., dated 23-8-2007 was issued.

The relevant Extracts from this circular reads as under :

Reference Code	**Issue**	**Clarification**
(1)	(2)	(3)
999.03 /23-8-2007	A taxable service provider outsources a part of the work by engaging another service provider, generally known as sub-contractor. Service tax is paid by	A sub-contractor is essentially a taxable service provider. The fact that services provided by such sub-contractors are used by the main service provider for completion of his work does not in any way alter the fact of provision of taxable service by the sub-contractor. Services provided by sub-contractors are in

	the service provider for the total work. In such cases, whether service tax is liable to be paid by the service provider known as sub-contractor who undertakes only part of the whole work.	the nature of input services. Service tax is, therefore, leviable on any taxable services provided, whether or not the services are provided by a person in his capacity as a sub-contractor and whether or not such services are used as input services. The fact that a given taxable service is intended for use as an input service by another service provider does not alter the taxability of the service provided.

22. The argument of the distributors in the present case is not as unreasonable as illustrated in the example discussed in para 20 above. The following aspects need to be noted in this regard. This is not a case where the distributor is doing a service, billing for it, collecting the charges for the service and then BSNL charging for the services to the customers through a separate process. On the contrary this is a case where BSNL sells the cards through the distributor and collects money from customers through the distributor and then pays to the distributor out of consideration received by them from their customers on which consideration service tax is first discharged by BSNL. That is to say the transactions of both the parties are essentially one and payment on the full value of service occurs earlier than payment of commission to the distributor. Further payment of tax on full value of service rendered by the principal, that is BSNL, is easily verifiable unlike in the case of services rendered by many other sub-contractors for other type of services.

23. Some services which are on similar footing as sale of sim cards or re-charge coupons by distributors are services provided by

(a) sub-broker to a stock broker;
(b) mutual fund agent to a mutual fund or asset management company;
(c) selling or marketing agent of lottery tickets to a distributor or a selling agent.

24. Interestingly the above services as also the services of selling agent or a distributor of SIM cards or recharge coupon vouchers have been exempted from service tax vide entry No. 29 in Notification 25/2012-S.T., dated 20-6-2012. So the special nature of services in such cases is recognized though only recently.

25. Considering the special nature of the impugned activities and the fact that it can be easily verified that full taxable value of the service provided by BSNL to customers is subjected to tax, I am of the view that there is no case to undo decisions already taken by the Tribunal in this regard. A contrary approach will result in a difference in value that is taxed for mobile telecom service according to the decision of the Apex Court in the case of *Commissioner* v. *BPL Mobile Cellular Ltd*. - 2011 (24) S.T.R. J175 (S.C.). I also note that this issue has lost relevance for the future because of exemption under Notification 25/2012-ST-S. No. 29 for this type of service. So I agree with the outcome as recorded by Member (Judicial).**"**

(b) In the case of Goyal Automobiles (supra) the Tribunal has passed the following order:-

"6. We note that the impugned order has built its foundation on the assumption that appellants render "business auxiliary service" in relation to SIM cards and hence liable to tax on the commission earned by them. At the same time, the impugned order has considered the commission received as discount on sale of recharge and "top-up" coupons as not liable to tax following the decision of the Tribunal in *Commissioner of Central Excise, Meerut* v. *Moradabad Gas Service* [2013 (31) S.T.R. 308 (Tri.-Del.)]. Our attention has also been drawn to the decisions of this Tribunal in the case of *GR Movers* v. *Commissioner of Central Excise, Lucknow* [2013 (30) S.T.R. 634 (Tri.-Del.)] and *Daya Shankar Kailash Chand* v. *Commissioner of Central Excise & Service Tax, Lucknow* [2013 (30) S.T.R. 428 (Tri.-Del.)]. The Hon'ble High Court of Allahabad has upheld these two decisions.

7. We find that this contrived distinction attempted in the impugned order by the first appellate authority does not conform to logic or to any commercial distinction. On the contrary, the three decisions cited above are clear in laying down the principle that the user of the telephony services is the service recipient and tax liability on the gross value charged from such customer, whether first-time purchaser of SIM card or subsequent purchaser of other cards, is collected from the customer and deposited to Government account by the principal. An attempt has been made to catalogue the various activities that devolve on the appellants in relation to activation of SIM cards without appreciating the fact that the SIM cards are marked with an MRP on which tax is collected in full from the customer. Therefore, the commission paid to appellants is also included in the value on which tax has been collected from the customer. The customer is, consequently, the recipient of the full value of services from none other than M/s. Bharat Sanchar Nigam Ltd.; thus, it is no different from the other two products.

8. The rationale for non-leviability of tax in relation to recharge and 'top-up" coupons in Paragraph 26 in re *GR Movers* (supra) is as follows :

"26. Though the correct procedure for discharge of the service tax liability by the two parties is that the distributors raise bills for commissions that is due to them along with service tax and BSNL takes Cenvat credit of tax paid by distributors for discharging liability on the telecommunication service provided by BSNL, such procedure dos (sic) not result in extra realization of Revenue. Considering the special nature of the impugned activities and the fact that it can be easily verified that full taxable value of the service provided by BSNL to customers is subjected to tax, we are of the view that there is no case to undo decisions already taken by the Tribunal in this regard. A contrary approach will result in a difference in value that is taxed for mobile telecom service according to the decision of the Apex Court in the case of *Commissioner* v. *BPL Mobile Cellular Ltd.* - 2011 (24) S.T.R. J175 (S.C.). We also note that this issue has lost relevance for the future because of exemption under Notification 25/2012-S.T.-S. No. 29 for this type of service."

9. As commission system and sale methodology in relation to SIM cards is the same as the other two products, we, for the reason elaborated supra, set aside the impugned orders and allow both the appeals with consequential relief.**"**

(c) In the case of Dyal Medicos (supra) the principle Bench of this Tribunal passed the following order:-

"2. The facts of the case are as under :

The appellants are franchisee of BSNL for providing the service of promotion and marketing and distribution of various products of BSNL for which they were receiving commission but did not pay service tax thereon. The adjudicating authority held that the appellants provided Business Auxiliary service and so were liable to service tax and hence the adjudicated liabilities mentioned above.

3. The appellants have contended that the BSNL had discharged the service tax liability upfront on the full value equal to the MRP which was inclusive of appellants' discount/commission and therefore they were not liable to pay the impugned service tax. They claimed that the issue is covered in their favour by several judgments of CESTAT including a judgment in the case *M/s. Martend Food and Dehydrates (P) Ltd. and Others* v. *CCE, Kanpur* : CESTAT Final Order No. ST/A/684-687/2012-CU[DB], dated 6-11-2012 [2013 (30) S.T.R. 634 (Tri.)].

4. We have perused various judgments of CESTAT in this regard including the one referred to by the appellants. In the case of *Daya Shankar Kailash Chand* v. *CCE & ST, Lucknow* - 2013 (30) S.T.R. 428 (Tri.-Del.) the Hon'ble CESTAT held as under :

> "We have seen the Supreme Court judgment in the case of *Idea Mobile Communication Ltd.* [2011 (23) S.T.R. 433 (S.C.)]. The issue involved before the Hon'ble Supreme Court was as to whether the value of the SIM cards is required to form part of the activation charges or not. Inasmuch as the issue before the Hon'ble Supreme Court was entirely different than the issue involved in the present case we are of the view that following said decision by Commissioner (Appeals) in preference to the decision of Tribunal on the same issue as involved in the present case is not proper. We also refer to the latest decision in the case of *Martend Food & Dehydrates Pvt. Ltd.* vide Final Order No. ST/A/684-687/2012-Cus., dated 6-11-2012, wherein after taking note of the entire case law available on the said issue, the Tribunal in a detailed order has held that activity of purchase and sale of SIM card belonging to BSNL where BSNL has discharged the Service Tax on the full value of the SIM cards, does not amount to providing business auxiliary services and confirmation of demand on the distributors for the second time is not called for. By following the said decision, we set aside the impugned order and allow the appeal with consequential relief to the appellants."

The above judgment has been upheld by Hon'ble Allahabad High Court also : [2014 (34) S.T.R. J99 (All.)].

5. In view of the above settled legal position, the pre-deposit is waived, appeal is allowed and the impugned order set aside**."**

5. Considering the above decisions, we are of the view that demand on commission for sale of SIM cards is not sustainable, hence the impugned order is set-aside and the appeal is allowed.

(Pronounced in the open court on 05.10.2023*)*

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

KL