FAX : 011-26108426

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
Old Rea Building ~~Room No.210 & 220, 2nd Floor~~, 38,M.G.Marg, Civil Lines
~~Office Of Commissioner Of Central Excise,Customs,Service Tax~~, Allahabad-211001
ABC ~~APPEAL BRANCH~~

Dated: 17/09/2015

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/ 70012 /2015- dated 16/09/2015

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar(~~ABC~~ Appeal Branch)

Application	Appeal	Name and Address of Appellant
	ST/1354/2010	CHOTEY LAL RADHEY SHYAM CAPITAL CINEMA BUILDING HAZRATGANJ, LUCKNOW. UP

Name and Address of Respondent	CCE LUCKNOW 7-A ASHOK MARG, LUCKNOW.

Other Appellants and Respondents as per Annexure

Copy To

3 Advocate(s) / Consultant(s): SH VINEET KR.SINGH,CA
5 NARAIN NAGAR, SECTOR11
INDIRA NAGAR, LUCKNOW.

4 Bar Association, CESTAT, Delhi

5 Director Publications, Customs, Excise, I.P. Estate, Delhi
6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3
7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17
8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15
10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi – 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

13 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar
Regional Bench, Allahabad

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CIRCUIT BENCH AT ALLAHABAD

APPEAL NO: ST/1354/2010

[Arising out of Order-in-Original No: 19/Commr./LKO/2010 dated 03/07/2010 passed by the Commissioner of Central Excise, Lucknow.]

For approval and signature:

Hon'ble Shri P. S. Pruthi, Member (Technical)
Hon'ble Shri S.S. Garg, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	No
2.	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	No
3.	Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	:	Yes

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Choley Lal Radhey Shyam ...*Appellant*

Versus

Commissioner of Central Excise & Service Tax
Lucknow ...*Respondent*

Sgay

Appearance:

Shri Vineet Kumar Singh, Advocate for the appellant

Shri Govind K. Dixit, Addl. Commissioner (AR) for the respondent

CORAM:

Hon'ble Shri P. S. Pruthi, Member (Technical)
Hon'ble Shri S.S. Garg, Member (Judicial)

Date of hearing:	**16/09/2015**
Date of decision:	**16/09/2015**

Final **ORDER NO:** 70012 | 2015

Per: S. S. Garg:

The present appeal is directed against the Order-in-Original No: 19/Commr./LKO/2010 dated 03/07/2010 passed by the learned Commissioner of Central Excise & Service Tax, Lucknow holding that service tax is payable on the profit margin earned by the appellant during the course of trading of sim cards and recharge coupon of Bharat Sanchar Nigam Ltd. (BSNL) thereby upholding the demand of service tax amounting to ₹1,21,71,306/- along with penalty under Section 78, 77(1)(a) and (e) of the Finance Act, 1994. Aggrieved by the said order, the appellant is before us by way of present appeal.

Sd/-

2. Brief facts of the case are that M/s. Choley Lal Radhey Shyam was appointed as a franchisee for Lucknow by BSNL for the sale of sim cards and recharge coupons of BSNL, who in turn, sells the same through network of retailers, which amounts to trading activity and the appellant has not provided any service to BSNL and the alleged agreement between him and the BSNL is on principal to principal basis. This relationship between the two was conveyed to the Commissioner by producing a letter in writing by Chief General Manager of BSNL. It is further alleged that BSNL has paid the service tax on the face value of the sim cards and recharge coupons including the profit margins of the franchisee, i.e., the appellant.

3. Learned Counsel for the appellant submitted that the respondent-Revenue failed to bring in any evidence on record showing that the appellant is generating demand, rectifying complaints, providing after-sale service, promoting BSNL brand, performing other promotional events, etc. Whereas, the appellant has produced on record the letter written by the Chief General Manager of BSNL to Commissioner of Central Excise and Service Tax, clarifying that the relationship between BSNL and its franchisee. Chief General Manager had also informed the Commissioner that BSNL does not pay any commission to its franchisee and only offer discount to their franchisee at the time of sale of recharge vouchers. He further submitted that the appellant is not carrying on the activity of

'Business Auxiliary Service' and having only purchased sim cards and recharge coupons and sell the same and earn profit in the process and this activity of purchase and sale comes within the purview of sale of goods and sales tax is attracted. In support of his submission he rely upon the judgments of the Tribunal in the case of *G.R. Movers vs. Commissioner of Central Excise, Lucknow* 2013 (30) STR 634 (Tri.Del.) wherein the hon'ble Tribunal has held that service tax is not payable on the commission paid by BSNL out of the value of services for which BSNL has already paid service tax. The Tribunal in this case relied upon the following judgments:

(i) *Chetan Traders* v. *CCE* 2008 (17) STT 318 (New Delhi-CESTAT);

(ii) *Hindustan Associated Traders* v. *CCE* [Final order Nos. 673 & 674 of 2007, dated 7-6-2007]

(iii) *South East Corpn.* v. *CCE& ST* 2009 (22) STT 446 (Bang.-CESTAT)

(iv) *Karakattu Communications* v. *CCE* 2009 (21) STT 384 (Bang.-CESTAT)

4. Revenue filed appeal against the decision of the Tribunal in the case of *G.R. Movers* (supra) before the Allahabad High Court bench at Lucknow and the same was dismissed. The Hon'ble High Court, while dismissing the appeal has observed as under:

"From the record, it appears that the controversy involved in the instant appeal has already been adjudicated by this Court in Central Excise Appeal No.21 of 2013 decided on 25/07/2013. The operative portion, on reproduction, reads as:

> 'After hearing learned Counsel for the appellant, we are of the opinion that no substantial question arises in the instant appeal, in view of the decisions of the Apex Court in the case of *Martend Food & Dehydrates Pvt. Ltd.* vide Final order dated 6.11.2012, wherein it was 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 Service. Therefore, no interference is called for.
>
> Accordingly, the appeal is dismissed at the admission stage itself."

4.1. Further, in identical case of *Daya Shankar Kailash Chand vs. Commissioner of Central Excise & Service Tax* 2013 (30) STR 428 (Tri.Del.), the Tribunal held that the activity of purchase and sale of sim card belonging to BSNL where BSNL has discharged service tax on the full value of sim card does not amount to providing 'Business Auxiliary Service'.

5. The Learned A.R, for Revenue submits that activities of the appellants as seen from the contract clearly brings out that service in the nature of business auxiliary service is being rendered by appellants to BSNL. He draws attention to 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:-

S Garg

"(*a*) The BSNL is desirous of appointing Distributors with a view to do marketing and distribution of its Cellular Mobile Telephone Services (CMTS) under its brand name for which the BSNL has been licensed to provide cellular mobile service.

(*b*) The Distributor has approached the BSNL for, authorising it to act as such an authorised Distributor for marketing and distribution of cellular mobile services subject to the terms and conditions hereinafter appearing.

(*c*) The Distributor has given an unconditional Bank guarantee (as per annexure D of Rs. 5,00,000/-(Rupees Five lakh only) which shall be refundable for the due fulfilment of the said agreement."

"1-6 Agent/Sales Executive/Sales force: In the interest of increasing the customer base, the Distributor can appoint retailer solely for the purpose of booking new prepaid cellular mobile connections"'

"1.9 Customer Counsellors; In the office a sale – person who receives walk-in-customers, understands their requirement, demonstrates the service and tries to close the order, have been appointed by the Noticee. Also he attends to telephonic enquiries and pursue the same,

1-10 Customer Care Executives: These are trained persons who guide/solve the problems of the subscribers regarding the usage of the service/handset and interact with the customer care centre for complaint handling.

"5. Scope of Marketing & Distribution: The distributor shall provide cellular mobile services to walk-in customers. It shall also establish, through its sales force, direct contract with prospective customers and register as many new cellphone customers as possible subject to a minimum number fixed by BSNL Distributors shall also distribute prepaid products and services to its retailers."

"8.1 The BSNL will grant to the Distributor right for the marketing and distribution of products and services in the territory as described in Annexure- F from the Dealer outlet(s) for which the BSNL will compensate the distributor as described,"

"9. General Obligation of the Distributor:

9.1 The Distributor shall maintain a suitable organisation for the marketing and distributor of products and services in the allocated territory from his outlet(s).

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

9.7 (*a*) That the Distributor shall not have any authority to store, sell or transfer or in anyway dispose of the merchandise except as provided in this Agreement (b) that the BSNL shall be liable to the quality and genuineness of the goods sold by the Distributor,"

"10.2 The BSNL may provide the marketing material to the Distributor. This may include but not limited to, information brochures, poster, inserts special giveaways, mailers (target-segment-specific) sales kits, folders, subscription forms, receipt books, stickers etc.

S.Garg

10.3 The BSNL will endeavour to activate a cellular connection within 24 hours of receipt of documents indicating completion of booking formalities and realization of booking account,"

"19. Payment terms:

Basic Commission : The basic commission payable is as per Annexure B, BSNL reserves the right to change the target and commission along with commission structure at anytime during the period of agreement. Target will be fixed on stat of operation on per month basis."

5.1. The ld. A.R. points out the tax paid by BSNL is for telecommunication service provided by BSNL to customers and the tax demanded in the present appeals is for Business Auxiliary Service provided by the distributors to BSNL and there is no double taxation of the same service.

6. We have heard both the sides and perused the records. On perusal of the records, we find that, in this case, BSNL had already paid service tax on the sim cards and recharge coupons sold to the franchisee and again demanding service tax from the franchisee would amount to double taxation which is not permissible in law. Secondly, we find that the appellant is only engaged in purchase and sale of sim cards and recharge coupons and his relationship with BSNL is of principal-to-principal basis. The appellant cannot be termed as an agent of BSNL. In view of this, the finding of the learned

Commissioner that the appellant is promoting the business of sale or service of BSNL is misconceived. The impugned order is therefore not consistent with law and the catena of judgments delivered by the Tribunal and High Court. The judgment cited above by the learned counsel for the appellant squarely cover the case of the appellant to the fact that the appellant is only engaged in trading activity and does not render any taxable service in the category of 'business auxiliary service'.

7. By following the decisions cited above, we set aside the impugned order and allow the appeal of the appellant with consequential relief, if any, in accordance with law.

(Pronounced in Court)

Sd/-	Sd/-
(P.S. Pruthi)	**(S.S. Garg)**
Member (Technical)	**Member (Judicial)**

प्रमाणित प्रति / Certified True Copy

सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
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