FAX : 0532-2400149

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 02/03/2017

To

Appellant as per address in table below
Respondent as per address in table below

Final Order No. ST/A/70230/2017-CU[DB] dated 17/02/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	ST/70097/2016	Times Telecom S-65,gole Market,mahanagar LUCKNOW UP
		Name and Address of Respondent
2		C.C.E. & S.T.-Lucknow 7-A...ASHOK MARG, LUCKNOW, UTTAR PRADESH-226001

Copy To
3Advocate(s) / Consultant(s):

T. K. Srivastava
311, Murli Bhawan,
Ashok Marg,
Lucknow,
Uttar Pradesh

4 Bar Association, CESTAT, Allahabad

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 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

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

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

13 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

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

Asstt. Registrar

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
REGIONAL BENCH : ALLAHABAD

S.T.Appeal No.70097/16

Arising out of OIA No.309-ST/APPL-LKO/LKO/2015 dated 10/08/2015 passed by the Commissioner (Appeals), Central Excise, Customs & Service Tax, Lucknow.

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, 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 the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	: Yes
3.	Whether His Lordship wishes to see the fair copy of the Order?	: Seen
4.	Whether Order is to be circulated to the Departmental Authorities?	: Yes

---

M/s Tiems Telecom, Lucknow (Proprietor Preeti Kulshreshtha)
...APPELLANT(S)

VERSUS

Commissioner of C.Ex. & S.Tax, Lucknow
RESPONDENT (S)

APPEARANCE

Shri T. K. Srivastava, Advocate for the Appellant (s)
Shri D. K. Deb, Asstt.Commr. (A.R.) for the Respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

DATE OF HEARING & PRONOUNCEMENT : 21.06.2016

Final ORDER NO. 70230/2017

सीमा शुल्क उत्पाद एवं सेवा कर अपील अधिकरण
CUSTOMS EXCISE & SERVICES TAX APPELLATE TRIBUNAL
सत्यमेव जयते

Per Mr. Anil Choudhary :

The appellant (a proprietorship concern of Preeti Kulshreshtha) being a service provider (w.e.f. 14.02.2008) under the category of "Business Auxiliary Services", is in appeal against order in appeal dated 10/8/2015. The issue in this appeal is (i) whether the appellant is liable to pay service tax on the turnover achieved by Tiems Telecom (P) Ltd. (a company) having separate Service Tax registration number; and (ii) whether the appellant is entitled to deduction for reimbursement of certain expenses from the principal under the provisions of Section 67 of the Finance Act.

2. The brief facts are that a Ltd. Company-Tiems Telecom (P) Ltd. had entered into a contract for providing services with M/s Aircel Digilink India Ltd. which subsequently became M/s Vodafone Essar Digilink Ltd. after merger with Vodafone. The said company was registered with the Service Tax Department and was carrying on business since 2004-05. The appellant started business w.e.f. 14.02.2008.

3. SCN dated 15/10/10 was issued to the appellant for the extended period 2005-06 to 2008-09 on the basis of the turnover figures received by revenue from M/s Vodafone Essar Digilink Ltd.. It appeared to revenue that the appellant have short paid the service tax. The details of which are as follows: -

Period	Amt.ofCommission received from M/s Vodafone,Luck now	Rate of S.Tax,Ed.Cess, Higher Ed.. Cess (%)	Amt of S.Tax, payable	Amt of Ed.Cess payable	Amt of Sec.,Higher Edu.Cess, payable	S.Tax Paid by the Party	Total S.Tax liability
2005-06	658741	10% + 2%	65,874	1317	-	14543	52848
2006-07	376506	12% + 2%	45181	904	-	-	46085
2007-08	532026	12% + 2%+1%	63,843	1277	639	-	65759

2008-09	516522		61,983	1240	620		63,843
							2,28,335

It also appeared that the appellant have not submitted ST-3 returns and as such, they have contravened the provisions of the Act and the Rules, requiring them to show cause as to why an amount of Rs.2,28,335/- be not demanded being short paid along with interest and further penalty proposed under Section 70, 76 and 78 of the Act. Pursuant to remand by the Commissioner (Appeals) in the earlier round of litigation de novo order of adjudication was passed dated 24/7/14. The appellant had claimed that they are not liable for service tax prior to 14/2/08, which issue has been left undecided as per observation in the order in appeal, that the said ground was not pressed. Upon re-consideration, the adjudicating authority allowed credit of Rs.1,21,825/- out of the total demand and confirmed the balance demand of Rs.1,06,450/-. Being aggrieved the appellant preferred the appeal before the ld. Commissioner (Appeals), who vide the impugned order dated 10/8/2015, in so far as the issue of non-taxability of receipts in the nature of reimbursement is concerned, rejected the claim observing as follows: -

> "However, it is the point of the Appellant that the amount of demand is inclusive of the amount of reimbursement of expenses; that the service tax is payable only on the Commission and not on the expenses; that the short paid service tax corresponds to the amount of reimbursement of expenses & FOS.

It is, thus, the prime point to be deliberated upon, as to whether or not, the amount of 'reimbursement' & 'FOS' were actually and correctly covered under the demand in the case.

(5.3) The Appellant has submitted the copy of Appellant's statement of account' in the books of Vodafone, which is stamped by the Zonal Office of Vodafone Digilink Ltd., Lucknow, in evidence that they have received the reimbursement of expenses from their Principal.

(5.3.1) I have gone through said 'statement of account' of the Appellant. At the outset, I observe that such "statement of Account' is cryptic to the extent that it uses official terminology to notify the details of payments, without clarifying the exact meaning/scope thereof, thus, the meaning of such official terminology can be interpreted as per the 'common understanding only.

The Appellant has explained that, in the said statement, the abbreviation 'Comm' is used for 'Commission' while the abbreviations 'Reim' & 'Remb.' Are used for 'reimbursement'. Bisides, there are few other terminologies viz. 'Hero/Anmol PCO', 'Hero/Globe Teccom', which according to the Appellant are the "FOS'. There are some other terms like 'CC Salary' which the Appellant has explained as the salary of employees, and 'Rent Charges' which, according to the Appellant, stands for the rent of premises used by the Appellant for the purpose of business.

The Appellant has thus claimed that in the 'statement of account', whatever amount is mentioned against the 'reimbursement'or 'FOS', same should have been excluded from the service tax because these amounts are in the nature of 'payment of actual expenses', involving no service per se, hence these cannot be covered under service tax provisions.

(5.3.2) I agree with the Appellant, in principle, that the service tax is not chargeable on the amounts of 'reimbursement' & 'FOS'. However, as already stated, the terminologies used in the said 'statement of account' are cryptic which do not come up with clear sense, in which they are used. It is, thus, important to first test out as to whether the amounts, which the Appellant has described as the amounts of 'reimbursement' or 'FOS', are actually so, or not.

In order to clarify this point, I have gone through the 'Tele Shop Agreement' between the Appellant and their original Principal M/s Aircel Digilink India Ltd. (i.e. M/s ADIL). I notice that in view of the 'terms of agreement', M/s ADIL was not to make any 'reimbursement' etc. of 'Rent', 'Salary', 'Marketing' or of anything, per se, to the Appellant. Few relevant clauses of said 'Tele Shop Agreement' in this regard, are as under-

(i) It is mentioned at point no.-1.2.1 of the 'agreement' that the teleshop owner should have the requisite infrastructure for opening and running the teleshop. Further, the succeeding point no. 1.2.2 states that the title of said premises should be in the own name of the teleshop owner.
In view of that, it comes out that there is no question of paying the rent of such premises because such premises, being in the own name of teleshop owner, is the property of such teleshop owner ('Appellant, in the case');

(ii) Point no. 3 of the 'teleshop agreement' (which describes about the payments to be made by M/s ADIL), with exclusive emphasis on sub-clause no. 3.1.1 thereof, makes it clear that M/s ADIL will make no other payment to the teleshop owner, except the 'Commission' at the standard commission rates.
This clarifies that, except the 'commission', no other payment, including the 'reimbursement' or 'FOS', is to be made by M/s ADIL to the Appellant.

(iii) Point no.- 7.6 of the 'Tele Shop Agreement' provides for an 'Operating Manual', which is a part of said 'Tele Shop Agreement' and attached therewith as Annexure IV of the agreement.

A combined reading of point no.- 1(d), 1(e) & 1(f) of such 'Operating Manual', provides for the teleshop owner to ensure that he employs such number of persons, possessing such qualification and experience, as may be felt adequate and desirable by M/s ADIL, on the strength of a regular employment letter, however, the wages of such employees would be the responsibility of the teleshop owner.

This makes clear that no salary or wages were to be reimbursed by M/s ADIL to the Appellant;

(iv) Point no.-6(a) of the 'Operating Manual' is very categorical in this context as it prescribes that the teleshop owner shall carry out all his obligation at his own cost and expenses, including but not limited to usage of his own space and personnel, expenses on consumption of electricity, water all taxes that may be applicable from time to time etc., and **no reimbursement, whatsoever, shall be made by ADIL to the teleshop owner on any account, whatsoever,** unless specifically otherwise agreed by ADIL in writing.

Since, in this case, the appellant has not submitted any other written agreement etc. to evidence that M/s ADIL has agreed to make any reimbursement etc. to the appellant, hence it is clear that in this case M/s ADIL has made no 'reimbursement' to the Appellant, on any account, whatsoever.

(5.3.3) From the above, it is clear that as per the "Tele Shop Agreement", on 'reimbursement' of any kind was to be made to the Appellant by their Principal i.e. M/s ADIL. Further, as already said, the terminologies used in the referred 'statement of account' are not elaborated in the statement itself, and the Appellant also failed to produce any document which may clarify the 'nature' of such transaction, or any certificate from their Principal which may establish that any 'reimbursement' was actually made to them.

The Appellant, in their written statement dated 28.04.2015, has given a point that the 'statement of account' of Vodafone clearly states that no service tax was paid by the company on reimbursement of expenses, hence tax demand cannot be raised on the entire amount. However, I find that in the entire length of said 'statement of account', no amount is mentioned in the name of service tax, hence it not understandable as to why the Appellant has given such point which is manifestly contradicted by the referred document itself.

In any case, the documents available on record, particularly the 'Tele Shop Agreement', indicate that no 'reimbursement' was made to the appellant, and whatever amount was received by the appellant, in whatsoever name, was actually the 'Commission', in lieu of their services."

4. Heard the parties and perused the records. So far the first issue is concerned regarding the liability of tax for the turnover achieved by the Pvt. Company Ltd. in the hands of this appellant, I hold that appellant is not liable to tax for such turnover achieved by the Pvt. Ltd. Company, M/s Tiems Telecom Pvt. Ltd. on and before 14/2/08. So far the second issue is concerned as regards deduction of certain payment received by the appellant as a reimbursement, Section 67 of the Finance Act, 1994 provides that whatever is received by the service provider in his capacity as pure agent, such amounts shall not

form part of the gross turnover liable to tax. I further find that proper findings have not been recorded as to the exact nature of receipts and as to deductibility. Accordingly, I allow this appeal by way of remand to the adjudicating authority with the following directions:

(i) the appellant will not be liable to service tax prior to 14/2/08, on the turnover attributable to Pvt. Ltd. Company concern M/s Tiems Telecom Pvt. Ltd.;

(ii) the appellant will be entitled to deduction of such payments from the principal, for the expenses incurred on behalf of the principal as pure agent ;

(iii) the adjudicating authority shall be re-calculate the tax liability giving credit of challan, if any, still left out which the appellant may produce in the course of hearing, not produced earlier or earlier not considered for being illegible etc. Xerox copy shall be accepted on verification with computer records.

5. The appellant is also directed to appear before the adjudicating within a period of 45 days from the date of receipt of a copy of this order and seek an opportunity of hearing along with his representation in support of their contentions. The appeal is allowed by way of remand with the above directions.

6. So far as penalties under Sections, 76 and 78 are concerned, I find that it is not a case of deliberate default, as the appellants have paid substantially the amount of taxes and there appears to be interpretational issue in regard to gross amount taxable. Secondly, I

find that there was a dispute amount the Directors of the Pvt. Ltd. Company, which finally lead to the closure of the business in February, 2008. Accordingly, the penalties under section 76 and 78 are set aside.

(Dictated and pronounced in the open Court)

-Sd/-
(ANIL CHOUDHARY)
Member (JUDICIAL)

mm

प्रमाणित प्रति / Certified True Copy
07/03/2017
सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001