CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 2385 of 2011

(Arising out of Order-in-Appeal No. 321/2011 dated 06/05/2011 passed by CCE(Appeals-II), Bangalore)

BHARTI AIRTEL LTD
NO.55, DIVYASREE TOWERS,
BANNERGHATTA MAIN ROAD,
BANGALORE 560 029

Appellant(s)

VERSUS

Commissioner of Service Tax
BANGALORE SERVICE TAX- I
NULL 1ST TO 5TH FLOOR,
TTMC BUILDING, above BMTC BUS STAND,DOMLUR
BANGALORE, - 560071
KARNATAKA

Respondent(s)

Appearance:

Shri Ravi Raghavan, Advocate
LAKSHMI KUMARAN & SRIDHARAN
WORLD TRADE CENTRE NO.404-406, 4TH FLOOR, SOUTH WING BRIGADE GATEWAY CAMPUS NO.26/1, DR. RAJKUMAR ROAD,
BANGALORE - 560 055
KARNATAKA

For the Appellant

Shri P. Gopakumar, Jt. Commissioner(AR)

For the Respondent

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20032 / 2021

Date of Hearing: 19/01/2021
Date of Decision: 19/01/2021

Per : S.S GARG

The present appeal is directed against the impugned order dated 06/05/2011 passed by the Commissioner of Central Excise(Appeals), Bangalore whereby the learned Commissioner has rejected the appeal of the appellant as time-barred.

2. Briefly the facts of the present case are that the appellant is a telecom service provider with the service tax for providing telephone/mobile services. The appellant had inadvertently paid an amount of Rs.1,45,85,319/- towards service tax under the category of "Business Auxiliary Service" on the services provided to a foreign mobile service provider who enabled the subscriber of the said foreign service provider to avail International in-bound roaming facility. The appellant had filed a refund claim for the said amount of Rs.1,45,85,319/-. A show-cause notice was issued to the appellant as to why their refund claim should not be rejected under (a) Circular No.90/1/2007-ST dt. 03/01/2007 as their services were delivered and consumed in India and (b) Section 11B of Central Excise Act, 1994 made applicable to service tax refund matters vide Section 83 of the Finance Act, 1994. After due course of proceedings, the adjudicating authority passed the impugned order rejecting their refund claim on the ground that the appellant have admitted that the department has viewed the said services under 'Telephone Services' and not under 'Business Auxiliary Service', the deposited tax is considered to have been deposited for the Telephone services provided by the appellant. The said services were taxable under Section 65(105)(b) of Finance Act, 1994 and there did not exist any exemption notification, the tax payment was correct and question of refund does not arise. The adjudicating authority also held that service to inbound roamers was delivered and consumed in India so it does not amount to export and the domestic telecom operators providing roaming service to international inbound roamers are liable to pay tax on the amount received through the home network. Moreover the adjudicating authority held that even if admissibility of refund is there, the amount of refund should go to Consumer Welfare Fund in terms of Section 11B read with Section 12B of Central Excise Act, 1944 as made applicable to service tax under Section 83 of Finance Act, 1994 since the taxable value was considered under Section 67(2) of the Finance Act, 1994 so it can be

construed that the incidence of tax has been passed on to other person. Aggrieved by the Order-in-Original, the appellant filed appeal before the Commissioner(Appeals) who rejected the same as time barred. Hence the present appeal.

3.1. Learned counsel for the appellant submitted that the impugned order passed by the Commissioner(Appeals) rejecting the appeal as time-barred is not sustainable in law as the same has been passed without properly appreciating the facts and law. He further submitted that the appeal was filed within time but the only mistake committed by the appellant was that they filed the copy of the appeal in the office of the Commissioner of Central Excise and Service Tax. He also submitted that during the year 2007, the Tapal Section (filing section) was common to the office of the Commissioner of Central Excise and Service Tax as well as the office of the learned Commissioner of Central Excise(Appeals). It is his further submission that it is evident from the communications between the appellant and the office of the Commissioner of Service Tax that the learned Commissioner of Service Tax has acknowledged the filing of the appeal before him on 19/12/2017 and hence it is not disputed fact that the appeal papers were received in the office of the Commissioner of Service Tax and the same is available with them as recorded in the register as IC No.4437 at page No.254. He further submitted that the concerned authority should have transferred the appeal to the office of the learned Commissioner(Appeals) once it came to their knowledge that the appeal ought to have been filed before the learned Commissioner(Appeals). He also submitted that it is well settled legal position as decided by various decisions that where the appeal has been filed before the wrong forum, then the officer concerned should transfer the file to the right authority. For this submission, he has relied upon the following decisions:-

i. Academy of Maritime Education & Training Trust Vs. CST (Appeals-I), Chennai [2018(11) GSTL 261(Mad.)]
ii. Geltec Pvt. Ltd. Vs. CCE,C&ST, Bangalore-I [2018(364) ELT 671 (Tri. Bang.)]
iii. AT&T Communications Services India Pvt. Ltd. Vs. CC, Bangalore [2007(219) ELT 461 (Tri. Bang.)]

iv. Taher Ali Industries & Projects Pvt. Ltd. Vs. CCE [2008(230) ELT 134 (Tri. Bang.)]
v. Horticulture Development Foundation Vs. CST, Kolkata [2014-TIOL-1818-CESTAT-KOL]
vi. Maruti Udyog Limited Vs. CC [2009(244) ELT 66 (Tri. Ahmd.)]

3.2. He also submitted that the appeal filed on 19/12/2007 before the Service Tax commissionerate should be treated as having been filed within time and therefore the same is not time-barred and the impugned order is liable to be set aside.

4. On the other hand, the learned AR submitted that the appeal has been filed on 11/03/2011 by delay of more than 3 years from the date of issue of order and therefore it is beyond the condonable period as provided in Section 85(3) of the Finance Act, 1994. He also submitted that there was negligence on the part of the appellant in submitting the appeal memorandum in the Service Tax commissionerate instead of office of the Commissioner(Appeals) as provided in the preamble of the Order-in-Original.

5. After considering the submissions of both the parties and perusal of the material on record and the decisions relied upon by the appellant, we find that admittedly, the appellant has filed the appeal on 19/12/2007 but the same was wrongly filed before the Commissioner of Service Tax which was located in the same building. The factum of receipt of the appeal in the office of Commissioner of Service Tax is admitted in the correspondence between the appellant and the Department. Further, we find that after filing the appeal, the appellant vide its letter dt. 01/12/2008 and subsequent reminder dt. 12/12/2010 requested the Commissioner(Appeals) for grant of personal hearing. The appellant even filed RTI application to find out the whereabout of the appeal and came to know that the appeal is lying with the Commissioner of Service Tax. Further we find that if the appeal was filed wrongly before the Commissioner of Service Tax, then it was the duty of the CST to have sent the same to the Commissioner(Appeals) who was located in the same building but the same was not done by the Department and therefore the time spent in pursuing the appeal before the wrong forum is condonable in view of the decisions cited supra. Since the appeal was filed

on 19/12/2007, which is deemed to be filed well within time and hence the dismissal of the appeal on time bar is not sustainable and therefore we set aside the impugned order and remand the matter back to the learned Commissioner(Appeals) with direction to decide the appeal on merits after complying with the principles of natural justice. Appeal is allowed by way of remand.

(Operative portion of the Order was pronounced
in Open Court on **19/01/2021**)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

Raja...