

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH**

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 61720 of 2018

[Arising out of Order-in-Original No. 03/ST/COMMR/VMJ/RTK/2018-19 dated 31.05.2018 passed by the Commissioner of Central GST, Rohtak]

**Commissioner of Central Excise andAppellant
Central Goods & Service Tax, Gurugram**

Plot No. 36-37, Sector 32,
Gurugram, Haryana 122001

VERSUS

M/s Bharti Teleport Ltd

.....Respondent

Airtel Centre, Plot No. 16,
Udyog Vihar, Phase-IV,
Gurugram, Haryana 122015

APPEARANCE:

Sh. Anurag Kumar and Sh. Aneesh Dewan, Authorized Representatives for
the Appellant

Sh. Amrinder Singh, Ms. Shreya Khunteta and Ms. Samiksha Unityal,
Advocates for the Respondent

CORAM:

HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)

HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 60580/2024

DATE OF HEARING: 26.06.2024

DATE OF DECISION: 16.10.2024

PER : S. S. GARG

The present appeal is filed by the Revenue against the
impugned order dated 31.05.2018 passed by the Commissioner of
Central Goods & Service Tax, Rohtak whereby the learned
Commissioner has dropped the demand of service tax amounting to

Rs.2,83,77,531/- as proposed in the show cause notice. Aggrieved by the said order, the Revenue has filed the present appeal.

2.1 Briefly stated facts of the present case are that the respondent is registered with the Service Tax Department for discharge of service tax under 'Erection, Commissioning or Installation', 'Information Technology Software Services', 'Legal Consultancy Service', 'Management, Maintenance or Repair Services', 'Telecommunication Services' and 'Transport of Goods by Road Services/Goods Transport Agency Service'.

2.2 During the course of audit and on scrutiny of the records, it was observed that the respondent has, besides other foreign currency expenses, made expenses in foreign currency for receipt of services in the name of "Operating lease charges" claimed to be comprising of Operating charges, Bandwidth Charges, Space segment, Transponder Services etc. On scrutiny of the invoices, it was observed that the service provider namely M/s Intelsat Global Sales and Marketing Ltd located in United Kingdom (hereafter in short '**M/s Intelsat**') has provided Transponder Services and for providing said services, the service provider has charged the service recipient in US\$. It was also alleged that the respondent has received services in the name of Bandwidth charges, Space segment charges and Transponder charges. The terms "Leased Bandwidth charges/transponder charges/spectrum charges/satellite bandwidth charges are different name for the same thing for teleport. For the respondent, M/s Intelsat is the only foreign satellite operator providing the

transponder/spectrum/satellite bandwidth services to them. The respondent in their submissions before the audit team claimed that the Bandwidth charges, Space Segment charges and Transponder charges fall under the definition of "Telecommunication Services" as it existed before 01.07.2012. The respondent has received Transponder Services from a service provider situated outside India and has made payment to the said service provider in foreign currency for receipt of the said services but has not paid service tax on receipt of said services under reverse charge claiming that the said services received by them fall under the definition of "Telecommunication Services" as it existed before 01.07.2012. Whereas, from the copy of licence submitted by the respondent, it appeared that they have been issued the said licence by the Government of India, Ministry of Communication, Department of Telecommunication for operational traffic relating to Teleport Services. As per the common parlance a telecommunications port or more commonly, teleport is a satellite ground station that functions as a hub connecting a satellite or geocentric orbital network with a terrestrial telecommunications network, such as the Internet. Further, business activities undertaken by the respondent and the invoices raised by them to their customers, it was observed that they are working/providing service as/of uplinking hub for the Broadcasting agencies/TV channels i.e. uplinking of their content to the satellite on a bandwidth and for providing the said services the respondent is charging their customers. Further, for providing the said service to their customers, the respondent has entered into an agreement with M/s Intelsat and

has obtained a dedicated Transponder service on satellite in space from M/s Intelsat, a company located outside India. Further, on examination of said agreement, it was noticed that Transponder service is the supply of satellite capacity to be managed by customer i.e. the respondent. Further, as per the agreement, the service is non-preemptible service and as per the agreement non-preemptible Transponder Service means "the service cannot be interrupted to restore other services or cancelled to restore other services". Thus, it appeared that M/s Intelsat owns some satellites in the space having a certain capacity i.e. transponder capacity and out of the said transponder capacity available on the satellite, they allocate some capacity to each of their customers for a consideration. Whereas, it further appeared that the respondent had been allocated a certain transponder capacity on the satellite of M/s Intelsat and for the said allocation, the respondent is making payments in foreign currency to M/s Intelsat. Whereas, in turn, the respondent is using the said capacity allocated to them for providing their output service to their own customers. Therefore, it appeared that the services received by the respondent i.e. supply/allocation of capacity of transponders on a satellite of M/s Intelsat is operational/ infrastructure support for providing their output service i.e. Teleport service which is rightly classifiable under "Support Services of Business or Commerce" as defined under Section 65(105)(zzzq) of the Finance Act, 1994 and not under "Telecommunication services" as has been claimed by the respondent. Thus, it was imputed that from the definitions of 'Support Service of Business or Commerce' and the nature of foreign currency

payments amounting to Rs.26,49,72,124/- made by the respondent to M/s Intelsat, the service provider from a country other than India, the respondent being recipient of service is liable to pay service tax on foreign currency expenditure incurred for receiving the said services for the period from October 2010 to June 2012 on which service tax of Rs 2,83,77,531/- (including Cess and HSEC) appeared to be recoverable from them on account of "Support Service of Business or Commerce" received by them from M/s Intelsat by invoking the extended period of limitation since they had intentionally and willfully suppressed the fact of receipt of the impugned taxable services as they did not file the prescribed ST-3 Returns mentioning the details correctly therein. Further, on reconciliation of invoices issued by the respondent to their customers for providing their output services vis-a-vis service tax paid on the same for providing the said output services, it was observed that the respondent had short paid service tax on a value amounting to Rs.48,99,582/-. The respondent, on being pointed out, paid the service tax amounting to Rs.5,04,657/- (including Cess and HSEC) along with the interest amount of Rs. 1,90,435/-, however, the respondent did not pay appropriate penalty.

2.3 On these allegations, a Show Cause Notice dated 22.04.2016 was issued to the respondent proposing to recover service tax amounting Rs.2,83,77,531/- alongwith interest by invoking the extended period of limitation and proposal of appropriation of said amount already deposited by them. Further, service Tax amounting

Rs.5,04,657/- short paid, was also proposed to recover by invoking extended period of limitation alongwith interest and the said amount of Rs.5,04,657/- and interest amount of Rs.1,90,435/- already deposited by them, was proposed for appropriation. Penalties under Sections 76, 77 and 78 of the Finance Act, 1994 were also proposed.

2.4 After following the due process, the Id. Adjudicating Authority vide the impugned order, dropped the demand holding that the transponder services provided by M/s Intelsat to the respondent are in the nature of 'Telecommunication Services' and these services are taxable only when they are provided by a telegraph authority as per the definition in clause (111) of Section 65 of the Finance Act, 1994 and the service provider M/s Intelsat is not a Telegraph Authority as required under the Finance Act, 1994. The Id. Adjudicating Authority has also observed that short payment of service tax had already been deposited alongwith interest and therefore, the penalties are not required to be imposed. Hence, the present appeal is filed by the Revenue on the following grounds:

(i) that the Adjudicating Authority erred in classifying the said services under "Telecommunication Services";

(ii) that the Adjudicating Authority failed to appreciate the fact that as per schedule 13 of Notes to the financial statement for the year ended March 31, 2011, the company was incorporated on October 6, 2008 with the principal object of *inter alia*, establishing, setting and operating uplinking hub (Teleport) including any other

mode of uplinking & downlinking facility with the accompanying amplification & related processes uplinking TV signals, teleport services etc to provide end-to-end communication needs and video distribution and contribution services within and outside India;

(iii) that the Adjudicating Authority also failed to appreciate the fact that as per copies of invoices raised by the respondent to their customers i.e. Taaza Infotainment Pvt Ltd, NDTV, Gujarat News Broadcasters Pvt Ltd, STV Enterprises etc, it is evident that their customers are broadcasting agencies and TV channels and that the respondent is providing service to these customers in the form of uplinking channel/content to the satellite and is charging the customers for the said service;

(iv) that M/s Intelsat Global Sales and Marketing Ltd owns satellites in the space having a certain capacity i.e. transponder capacity and out of the said transponder capacity available on the satellite. they allocated some transponder capacity to the respondent for a consideration in foreign currency and they further sold the said transponder capacity to the broadcasting agencies/TV Channels for uplinking their content to the satellite; therefore, the services received by the respondent i.e. supply allocation of capacity of transponders on a satellites by M/s Intelsat is operational infrastructure support for

providing their output service i.e. Teleport Service which is rightly classifiable under "Support Services of Business or Commerce" and not under "Telecommunication Services" as has been held by the Adjudicating Authority;

(v) that the Adjudicating Authority also failed to appreciate the fact that M/s Bharti Airtel Limited is one of the Associate Enterprises of the assessee-respondent having a significant influence over their operations. M/s Bharti Airtel Limited is also availing such transponder Service from M/s Intelsat. It was observed during the audit that M/s Bharti Airtel Limited was audited for the period 2009-10 to 2011-12 and during the audit, the issue relating to non-payment of service tax as recipient of services i.e. Transponder Services from M/s Intelsat was raised and M/s Bharti Airtel Limited voluntarily agreed and deposited the service tax alongwith interest on this issue and informed the same to the Service Tax department vide letter dated 22.04.2015;

(vi) that the charges paid by the respondent for the receipt of transponder capacity on satellites of M/s Intelsat are taxable under "Support Services of Business or Commerce" as defined under Section 65(105)(zzzq) of the Finance Act, 1994;

(vii) that on the other issue of short-payment of service tax of Rs.5,04,657/- on the output services of the respondent, the Adjudicating Authority refrained from

imposing any penalty under Sections 76, 77 and 78 of the Finance Act, 1994. The Adjudicating Authority failed to consider the facts that the ingredients for imposition of penalty have been clearly spelt out in the para 7 of the Show Cause Notice as the respondent had intentionally and willfully suppressed the facts of non-payment of service tax on the value of services suppressed by them and accordingly appropriate penalty should have been imposed.

3. Heard both the parties and perused the material on record.

4.1 The learned Authorized Representative appearing on behalf of the appellant-Revenue submits that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law.

4.2 The learned AR further submits that the nature of service provided by the respondent cannot be classified as "Telecommunication Service" and appropriately falls under the definition of "Business Support Service".

4.3 The learned AR further submits that the services received by the respondent i.e. supply/allocation of capacity of transponders on a satellite by M/s Intelsat is operational/infrastructure support for providing their output service i.e. Teleport service and therefore, the same is rightly classifiable under "Support Services of Business or Commerce" as defined under Section 65(105)(zzzq) of the Finance Act, 1994 and not under "Telecommunication services".

4.4 The learned AR further submits that the sister concern of the respondent M/s Bharti Airtel Limited is also availing such transponder service from M/s Intelsat and they have voluntarily agreed and deposited the service tax alongwith interest on this issue for the period 2009-10 to 2011-12.

4.5 The learned AR relies on the decision of the Tribunal in the case of **Ushodaya Enterprises Pvt Ltd vs. CCE & ST, Hyderabad – 2020 (42) GSTL 84 (Tri. Hyd.)**, wherein the Tribunal though allowed the appeal of the assessee on the limitation, but has given categorical findings that the activity has been rightly categorized as "Business Support Service". He particularly refers to the relevant finding of the Tribunal recorded in para 10 which is reproduced herein below:

"10. Once the transaction is outside the scope of sale or deemed sale and admittedly the transponder is hired by the appellant from M/s IGSML for supporting his business of broadcasting, we are of the opinion that department has rightly categorized the said transaction as an activity being provided by M/s IGSML to M/s UEPL in view of supporting the business of the later classifying it as a business support service."

5.1 On the other hand, the learned Counsel for the respondent submits that the Adjudicating Authority has rightly dropped the demand under 'Business Support Service' as the services provided by M/s Intelsat are not classifiable under 'Business Support Service' but are specifically covered under 'Telecommunication Services'.

5.2 The learned Counsel further submits that the respondent is receiving the transponder services from M/s Intelsat to uplink the content at the agreed bandwidth to the transponder on the satellite and to downlink the same on specified locations on earth.

5.3 He further submits that Section 65(109a) of the Finance Act was introduced w.e.f. 01.06.2007. Further, as per Section 65(110) of the Act, telegraph has the same meaning as assigned to it in Section 3(1) of Indian Telegraph Act, 1885 (in short 'Telegraph Act').

5.4 He further submits that the respondent utilises the transponder installed on the satellite to receive the content in form of signals through radio waves from the respondent's earth station which are then transmitted to the specified locations on the earth for broadcasting.

5.5 The Id. Counsel further submits that as per Section 65(105)(zzzx), the telecommunication services provided by telegraph authority are taxable and M/s Intelsat is not covered under the definition of 'Telegraph Authority' as provided by Section 3(6) of Telegraph Act. He also submits that since the M/s Intelsat is not a telegraph authority, hence the telecommunication services provided by M/s Intelsat are not taxable. In this regard, he refers to **Instruction F.No. 137/21/2011-ST dated 15.07.2011** and **Letter dated 19.12.2011** which clarifies that the telecommunication service is taxable only when it is provided by a person who has been granted a license under Section 4(1) of Telegraph Act. For this submission, he also relies on the on following judgements:

- **M/s Vodafone Essar East Ltd. vs. Commissioner of Service Tax - 2023 (12) TMI 48 - CESTAT Kolkata**
- **M/s Vodafone Idea Ltd. vs. Commissioner of GST & Central Excise - 2023 (10) TMI 432 - CESTAT Chennai**
- **Effective Teleservice P. Ltd. va. CCE & ST - 2023 (2) TMI 827 - CESTAT Ahmedabad**
- **M/s Qualcomm India Pvt. Ltd. vs. Commissioner of Customs & Central Excise - 2023 (3) TMI 332 - CESTAT Hyderabad**

5.6 He further submits that the respondent is not liable to pay the tax solely on the basis that M/s Bharti Airtel Limited, its associated enterprise, paid the tax for the relevant period. Both the enterprises are two distinct taxpayers and payment by one group entity has no bearing on the respondent's liability to pay the service tax.

5.7 It is his further submission that the department has wrongly alleged that the services provided by M/s Intelsat to the respondent are classifiable under 'Business Support Services' as it is providing the infrastructural and operational support in form of dedicated transponder service to the respondent for providing the teleporting services to the customers. He also refers to the definition of 'Business Support Services' and submits that transponder service received from M/s Intelsat cannot be covered under 'Business Support Services'. The 'Business Support Services' were introduced w.e.f. 01.05.2006 and thereafter a clarificatory instruction **D.O.F. No. 334/4/2006-TRU dated 28.02.2006** was issued to provide the clarification on

newly introduced services including 'Business Support Services'. It clarified that service tax is proposed on these services to tax all outsourced services. Further, **Circular No. 109/03/2009 dated 23.02.2009** also clarifies that the provision of independent services does not fall within the scope of 'Business Support Services'.

5.8 He further submits that the transponder service cannot be performed by the respondent and therefore, the transponder service procured from M/s Intelsat cannot be called a service which has been outsourced by the respondent to M/s Intelsat. Rather, M/s Intelsat is providing the transponder capacity for uplinking and downlinking the content to the respondent to its own account.

5.9 The Id. Counsel further submits that even if, it is assumed without admitting that the transponder services received by the respondent are classifiable under 'Business Support Services' and the respondent is liable to pay service tax on the same under reverse charge, still the demand is liable to be set aside as the whole exercise is revenue neutral because the respondent, as the provider of output services, is eligible to take the Cenvat credit of the service tax payable on the transponder services under Rule 3(1)(ixa) of Cenvat Credit Rules, 2004.

5.10 The Id. Counsel also submits that the entire demand is confirmed by invoking the extended period of limitation on the ground that the respondent has wilfully suppressed the fact from the department of receiving the transponder services and has not disclosed the correct details in the periodic returns with an intention

to evade tax. In this regard, the Id. Counsel submits that as per Section 73(1) of the Act, extended period can only be invoked if the service tax was not paid or levied by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Act or Rules with intent to evade payment of service tax. He further submits that in the present case the extended period of limitation cannot be invoked as there is no willful suppression of the facts and intention to evade tax on the part of the respondent and the issue in the present case involved the interpretation of complex provisions. In support of this submission, he relies on the decision of Allahabad Bench of the Tribunal in the case of **M/s Planetcast Media Services Ltd. vs. Commissioner of Central Excise, Noida - 2024 (3) TMI 1101 - CESTAT Allahabad**, the Tribunal has held that there has been a dispute in respect of interpretation of the term 'infrastructural support facility' used in the definition of Business Support Services. Similarly, in the case of **Dish TV India Ltd. vs. CCE & ST, Noida - 2020 (41) GSTL 633 (Tri. All.)**, the Tribunal has held that the issue involves interpretation of complex provisions and hence, extended period of limitation cannot be invoked.

5.11 He also submits that in the case of **Vedic Broadcasting Limited vs. Commissioner of Central Excise & Service Tax - 2021 (45) GSTL 33 (Tri. Del.)**, the department has itself classified the identical services received from M/s Intelsat under 'broadcasting services'; while on the other hand, in the present case, the

department is classifying the same services under 'business support services'. Therefore, with the presence of these divergent views, the respondent cannot be accused of any fraud or suppression and *mala fide* cannot be attributed to the respondent. In this regard, he relies on the following decisions:

- **Clix Capital Services Pvt Ltd vs. CST, Chennai - 2023 (5) TMI 302 - CESTAT CHANDIGARH**
- **Rama Overseas Company vs. CCE & ST, Vadodara-I - 2023 (10) TMI 1091 - CESTAT AHMEDABAD**

5.12 He further submits that the respondent has regularly been filing the periodical returns and was under the *bona fide* belief that they are not liable to pay service tax on the transponder services received from M/s Intelsat under reverse charge and therefore, *mala fide* cannot be attributed to the respondent. Reliance in this regard is placed by the Id. Counsel on following judgements:

- **Mahanagar Telephone Nigam Ltd. vs. Union of India and Ors. - 2023-TIOL-407-HC-DEL-ST**
- **Ericsson India Pvt. Ltd. vs. Commissioner of Service Tax, New Delhi - 2024 (1) TMI 643 - CESTAT CHANDIGARH**

5.13 He further submits that the allegation of the department that the nature of services received from M/s Intelsat was not disclosed in the financial statements with the department, is not sustainable because the format of the service tax return does not provide for a requirement of declaring the actual details of transactions nor is there any obligation to positively inform the department about the services

received from M/s Intelsat. The respondent cannot be accused of non-disclosure when there is no statutory requirement to disclose the information; therefore, consequently extended period cannot be invoked. In this regard, he relies on the decision in the case of **Commissioner of Central Excise and Customs and Anr. vs. M/s Reliance Industries Ltd. - 2023-TIOL-94-SC-CX.**

5.14 He further submits that the department failed in bringing out any evidence or shows any positive act of suppression on part of the respondent. The Respondent continuously exchanged correspondences with the department and provided documents and agreements as and when required by the department and the department was already aware of the facts. The department failed in establishing *mala fide* on part of the respondent, therefore, the extended period of limitation cannot be invoked. For this submission, he relies on the following Judgements:

- **M/s Mehta Construction Company vs. Commissioner of Central Excise, Panchkula - 2024 (3) TMI 284 - CESTAT Chandigarh**
- **M/s Goodyear India Ltd. vs. Commissioner of Central Excise and Service Tax, Delhi - 2023 (12) TMI 1009 - CESTAT Chandigarh**

5.15 He further submits that even if the respondent is liable to pay service tax on transponder services under 'business support services', they are still eligible to take the credit of the tax paid on these services as the input services are utilised by them to provide the output services and the whole transaction becomes revenue neutral

and therefore, extended period cannot be invoked. In this regard, he relies on the following case laws:

- **M/s Coforge Smartserve Limited (Formerly known as NIIT Smartserve Ltd.) vs. Commissioner of Service Tax, New Delhi - 2024 (1) TMI 826 - CESTAT Chandigarh**
- **Chemoli Adani P. Ltd. vs. Commissioner of S.T., Ahmedabad - 2024 (4) TMI 1063 - CESTAT Ahmedabad**
- **M/s Khadim India Limited vs. Principal Commissioner, Central Goods and Service Tax, Delhi North - 2024 (4) TMI 1008 - CESTAT New Delhi**

5.16 As regards interest and penalty, the Id. Counsel submits that since the demand of service tax itself is not sustainable, therefore, the question of interest and penalty does not arise.

6. We have considered the submissions made by both the parties and perused of the material on record. We find that the only issue involved in the present case is whether the services provided by M/s Intelsat to the respondent fall under the category of 'Telecommunication Services' as claimed by the respondent and which were exempted before June 2012; or the services are operational/infrastructural support for their output service which fall under the category of 'Support Services for Business or Commerce' as alleged by the department. Here it is pertinent to reproduce the definitions of 'Telecommunication Services' during the relevant period as well as 'Support Services for Business or Commerce', which are reproduced herein below:

“Telecommunication Services”:

Section 65(105)(zzzx): service provided or to be provided to any person, by the telegraph authority in relation to telecommunication service;

Section 65(109a): “telecommunication service” means service of any description provided by means of any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence or information of any nature, by wire, radio, optical, visual or other electro-magnetic means or systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception by a person who has been granted a licence under the first proviso to sub-section (1) of section 4 of the Indian Telegraph Act, 1885 and includes—

(i) voice mail, data services, audio tex services, video tex services, radio paging;

(ii) fixed telephone services including provision of access to and use of the public switched telephone network for the transmission and switching of voice, data and video, inbound and outbound telephone service to and from national and international destinations;

(iii) cellular mobile telephone services including provision of access to and use of switched or non-switched networks for the transmission of voice, data and video, inbound and outbound roaming service to and from national and international destinations;

(iv) carrier services including provision of wired or wireless facilities to originate, terminate or transit calls, charging for interconnection, settlement or termination of domestic or international calls, charging for jointly used facilities including pole attachments, charging for the exclusive use of circuits, a leased circuit or a dedicated link including a speech circuit, data circuit or a telegraph circuit;

(v) provision of call management services for a fee including call waiting, call forwarding, caller identification, three-way calling, call display, call return, call screen, call blocking, automatic call-back, call answer, voice mail, voice menus and video conferencing;

(vi) private network services including provision of wired or wireless telecommunication link between specified points for the exclusive use of the client;

(vii) data transmission services including provision of access to wired or wireless facilities and services specifically designed for efficient transmission of data; and

(viii) communication through facsimile, pager, telegraph and telex,

but does not include service provided by-

(a) any person in relation to on-line information and database access or retrieval or both referred to in sub-clause (zh) of clause (105);

(b) a broadcasting agency or organisation in relation to broadcasting referred to in subclause (zk) of clause (105); and

(c) any person in relation to 1[internet telecommunication service] referred to in sub-clause (zzzu) of clause (105);]

'Support Service of Business or Commerce' :

From 01.05.2006 to 07.04.2011 -

Section 65(104c) : support services of business or commerce" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, **operational assistance for marketing**, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.

With Effect From 08.04.2011 -

Section 65(104c) : support services of business or commerce" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer

relationship management services, accounting and processing of transactions, **operational or administrative assistance in any manner**, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.

[*Explanation* — For the purposes of this clause, the expression “infrastructural support services” includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security;]

Section 65(105)(zzzq) : to any person, by any other person, in relation to support services of business or commerce, in any manner;”

7. We have examined the agreements between the parties and we find that the transponder service means the supply of satellite capacity to be managed by the customer i.e. the respondent in the present case. M/s Intelsat on some satellite in the space having a certain capacity i.e. transponder capacity and out of the said transponder capacity available on the said satellite, they allocate some capacity to their customers for a consideration. The Id. Commissioner in the impugned order has also examined all the submissions made herein before us by the Id. Counsel for the respondent and after examining all the submissions, the Id. Commissioner has held that the services provided by M/s Intelsat are ‘Telecommunication Services’ which are not taxable during the relevant period. Here it is pertinent to reproduce the relevant findings recorded by the Id. Commissioner in the impugned order, which are reproduced herein below:

“15.8 I find that the noticee has executed an agreement with M/s Intelsat (a foreign satellite service provider). I have gone through the sample copy of agreement. I find from the agreement that M/s Intelsat is providing Transponder Service to the noticee. Under the Transponder Service, M/s Intelsat is giving the noticee right to use its transponder capacity of a satellite by allocating a particular bandwidth on that transponder. The noticee further uses the service provided by M/s Intelsat to provide their output services to their customers i.e. broadcasting agencies and TV Channels in the form of uplinking their content/channel to the satellite. Therefore, these activities are clearly and expressly covered in the ‘Telecommunication Services’.

15.9 I find that the telecommunication services are taxable only when they are provided by telegraph authority. I find that clause (111) of Section 65 of the Act defines ‘telegraph authority’ as

“(111) ‘telegraph authority’ has the same meaning assigned to it in clause (6) of Section 3 of the Indian Telegraph Act, 1885 (13 of 1885) and included a person who has been granted a licence under first proviso to sub-section (1) of Section 4 of the Act.”

The noticee has contended that in their case, the service provider i.e. M/s Intelsat is not a ‘telegraph authority’ within the purview of the definition provided in clause (6) of Section 3 of the Indian Telegraph Act, 1985.

15.10 I have also gone through the judgment of CESTAT Mumbai in the case of M/s TCS E-Serve Ltd vs. Commr of Service Tax, Mumbai [2014 (33) STR 641] relied upon by the noticee wherein it was held that for taxing a service under the category of ‘telecommunication service’, the service should have been provided by a telegraph authority.

15.11 I have perused Board's Letter F. No. 17/21/2011-ST dated 19.12.2011 which clarifies that telecommunication services are taxable only when provided by a person who has been granted a license under the first proviso to sub-section (1) of Section 4 of the Indian Telegraph Act, 1985. It also states that the view that what otherwise constitutes a 'Telecommunication Service' would amount to 'Business Support Service' is erroneous. Therefore, by relying upon Board's clarification which is binding on me, I find that the services cannot be classified under 'Business Support Services'. Also, it is clear that the service provider has not obtained any license under Indian Telegraph Act to be called as Telegraph Authority. It is only because the foreign telecom service provider cannot constitute a telegraph authority under an Indian law that they remain outside the taxability clause of the telecommunication services.

15.12 I find that the SCN propose to classify services received by the noticee under 'Business Support Service'. I find that this is a broader description as it includes number of other activities in its ambit whereas the service obtained by the noticee are expressly covered under 'Telecommunication Services' as noted earlier. Therefore, specific description is to be preferred over general description for classifying a service as per Section 65A(2)(a).

I am also in agreement with the contention of the noticee that definition of 'Business Support Service' prior to 08.04.2011 restricts coverage under the definition "operational assistance for marketing". However since the activities are specifically covered under 'Telecommunication Service', there is no need to give any further finding on it.

15.13 I have also perused the judgment passed by Tribunal Delhi relied upon by the noticee notably in the case of Vodafone Essar Mobile Vs. Commissioner of Service Tax, Delhi [2017 (6) GSTL 67 (Tri-del)], wherein it has been held that the telecom services provided by the noticee are covered under specific entry 'Telecommunication Service' and tax liability could not be brought in only for the reason that the said provider of service in foreign country is not a Telegraph Authority as required under Finance Act, 1994. In this matter, Tribunal relied upon in almost similar situation, the clarification issued by Board vide letter dated 19-12-2011 that what otherwise constitutes telecommunication service cannot amount to any other taxable service. This judgment reinforces the view taken by me.

15.14 In view of above discussion, I hold that the transponder services provided by M/s Intelsat to the noticee are in the nature of 'Telecommunication Services' and these services are taxable only when they are provided by a telegraph authority as per the definition in clause (111) of Section 65 of the Act and the service provider M/s Intelsat is not a Telegraph Authority as required under Finance Act, 1994 and hence the allegation that the noticee has received "Support Services of Business or Commerce" is not sustainable and the noticee is not required to pay Service Tax as proposed in the Show Cause Notice. This being the case, there is no question of any interest liability as well as any penal liability as proposed in the Show Cause Notice, as the Show Cause Notice is not sustainable on merits."

8. Further, after considering the definition of 'Telecommunication Services' as provided under the Act and the clarification made by the Board vide its Instruction dated 15.07.2011 which clarifies that telecommunication services are taxable only when it is provided by a person who has been granted a license under Section 4(1) of the Telegraph Act, we find that M/s Intelsat is not covered under the definition of telegraph authority as per Section 4(1) of the Telegraph Act and therefore, the services provided by M/s Intelsat are not taxable as M/s Intelsat is not a telegraph authority.

9. Further, we find that the decision of the Tribunal in the case of **Ushodaya Enterprises Pvt Ltd** (supra), relied upon by the Id. AR, is not applicable in the present case as in that case the main issue involved was whether the hiring/leasing space in a satellite amounts to sale or deemed sale and is subject to service tax under 'Support Services of Business or Commerce'; whereas, in the present case the issue is whether the services rendered by the respondent fall under the category of 'Telecommunication Services' or not.

10. We also find that the Id. Commissioner has given detailed reasoning to hold that the impugned services fall under the definition of 'Telecommunication Services' and not under 'Support Services of Business or Commerce' and we do not find any infirmity in that.

11. Further, we find that the entire demand has been confirmed by invoking the extended period of limitation. We also find that the extended period under proviso to Section 73(1) of the Act can be invoked only if the service tax was not paid or levied by reason of

fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Act or Rules with intent to evade payment of service tax. We find that the department has not established any ingredients which are required to invoke the extended period.

12. We also find that Allahabad Bench of the Tribunal in the case of **M/s Planetcast Media Services Ltd.** (supra) has held that there has been a dispute in respect of interpretation of the term 'infrastructural support facility' used in the definition of Business Support Services. In this regard, we may reproduce the relevant finding of the said decision, which is reproduced herein below:

"4.15 Uplinking facility from the teleport: In this case we find that issue involved is purely of interpretation of the terms of agreement vis a vis the provisions of the Act. On going through the terms of agreement which we had earlier reproduced and discussed we are of the view that appellant were entertaining a bona fide belief that these service would not be classifiable under any of the taxable categories. There is nothing in the agreement to show that appellant could not have entertained such a belief. Also we find that there has been dispute in respect of interpretation of the term "infrastructural support facility" used in the definition of Business Support Services. There are decisions which have held that the this term was restricted only to infrastructural support facilities, vis a vis the office maintenance facilities which have been out sourced. In view of the above it cannot be said that appellants could not have entertained such a belief. It is settled principle by various decisions that such a case cannot be the case of

suppression with the intent to evade payment of service tax."

13. We also find that in the case of **Vedic Broadcasting Limited** (supra), the department has classified the transponder services received from M/s Intelsat under 'broadcasting services' which shows that on the one, in the present case, the department is attempting to classify the same services under 'business support services' and on the other hand, in another case, they have classified the same under 'broadcasting services'. Further, we note that there are decisions of the Tribunal i.e. **Dish TV India Ltd** (supra) and **Sahara India TV Network vs. CST, Mumbai-II - 2020 (3) TMI 84 CESTAT MUMBAI**, in which there have taken divergent views on this issue and therefore, with the presence of these divergent views, the assessee-respondent cannot be accused of any fraud or suppression. It has been held that when there is a divergent view of the department on the same issue, *mala fide* cannot be attributed to the assessee-respondent as held in the cases cited supra.

14. Further, we find that the respondent was under a *bona fide* belief that they are not liable to pay service tax on the transponder services received from M/s Intelsat under reverse charge and they have been filing ST-3 returns regularly and no objection was raised by the department.

15. Further, we note that even if assuming that the respondent was liable to pay the service tax on transponder services under 'Business Support Services', they would still be eligible to take the credit of the

same as theses services being 'input services' were utilized by respondent to provide output services i.e. teleport services. Hence, *mala fide* intention to evade the tax cannot be attributed to the respondent. Therefore, extended period of limitation cannot be invoked as the situation would have been revenue neutral as held in various cases cited supra.

16. In view of our discussion above, we are of the considered view that there is no infirmity in the impugned order, accordingly we uphold the same by dismissing the appeal of the Revenue.

(Pronounced in the court on 16.10.2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)