

Appeal No. ST/60842,60858,60859,60860,60868/2018

Customs, Excise & Service Tax Appellate Tribunal
SCO 147-148, SECTOR-17-C, CHANDIGARH-160017

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Appeal No. ST/60842,60858,60859,60860,60868/2018

| Sr. No | Case No          | Impugned Order Detail's            | Date of Impugned Order | Passed By                                                | Appellant                    | Respondent              |
|--------|------------------|------------------------------------|------------------------|----------------------------------------------------------|------------------------------|-------------------------|
| 1      | ST/60842/2018-DB | OIA-LUD-EXUS-001-APP-338-424-18    | 28/02/2018             | Commissioner of Central Excise and Service Tax- LUDHIANA | Ms Blue Star Communication   | C.C.E. & S.T.- Ludhiana |
| 2      | ST/60858/2018-DB | OIA-LUD-EXCUS-001-APP-548-567-2018 | 12/03/2018             | Commissioner of Central Excise and Service Tax- LUDHIANA | Ms Ek Onkar Digital Services | C.C.E. & S.T.- Ludhiana |
| 3      | ST/60859/2018-DB | OIA-LUD-EXCUS-001-APP-548-567-2018 | 12/03/2018             | Commissioner of Central Excise and Service Tax- LUDHIANA | Ms Sharma Cable              | C.C.E. & S.T.- Ludhiana |
| 4      | ST/60860/2018-DB | OIA-LUD-EXCUS-001-APP-548-567-2018 | 12/03/2018             | Commissioner of Central Excise and Service Tax- LUDHIANA | Ms Ek Onkar Enterprises      | C.C.E. & S.T.- Ludhiana |
| 5      | ST/60868/2018-DB | OIA-LUD-EXCUS-001-APP-548-567-2018 | 12/03/2018             | Commissioner of Central Excise and Service Tax- LUDHIANA | Ms Shiva Cable               | C.C.E. & S.T.- Ludhiana |

**Represented by:**

For Appellant (s) : Shri B. L. Narsimhan, Advocate

For Respondent (s): Shri Tarun Kumar, Shri Vijay Gupta, ARs

**CORAM :**

**Mr. Ashok Jindal, Hon'ble Member (Judicial)**

**Mr. Bijay Kumar,, Hon'ble Member (Technical)**

Date of Hearing:20.02.2019

Date of Decision:22.02.2019

**FINAL ORDER No. A/60167-60171 / 2019**

**Per : Mr. Ashok Jindal**

These appeals are arising from the impugned orders wherein the demand of service tax has been confirmed against the appellants for providing cable operator service. As the issue involved in all the appeals are common, therefore, all are disposed of by a common order.

2. The facts of the case are that the appellants are cable operators providing cable services to the subscribers. From the charges for providing

the cable services, some portions of the subscription is retained by the appellants and the remaining portion is remitted to Fastway Transmission Pvt. Ltd., the MSO (Fastway) from whom the appellants receive the signals for re-transmission to the subscribers. For the portion remitted to M/s Fastway, M/s Fastway is discharging service tax liability or the consideration received from the appellants and the subscription retained by the appellant, if they are falling below the threshold exemption limit in terms of Notification No. 6/2005-ST dated 1.03.2005, the appellants were not paying service tax on the ground that they are not liable to pay service tax and did not get some registered with the department. On the basis of intelligence, the appellants were asked to provide the details of their activity and immediately, thereafter investigation was conducted at the end of the MSO i.e. M/s Fastway. The revenue collected data from M/s Fastway and for the data supplied by M/s Fastway, various show cause notices were issued to the appellants to demand of service tax on the gross amounts received by the appellants from the subscribers for providing cable operator services. The show cause notices were adjudicated, demand of service tax on gross amount of service charged by the appellants were confirmed by denying the benefit of exemption Notification No. 06/2005-ST dated 01.03.2005 alleging that the appellants are providing branded service, therefore, they are not entitled for SSI exemption and demands have been raised by invoking extended period of limitation. Against the said orders, the appellants are before us.

3. The Ld. Counsel appearing on behalf of the appellants submits that the appellants are not providing any services under a brand name, therefore, they are entitled for exemption under Notification No. 6/2005-ST dated 01.03.2005 and Notification No. 33/2012-ST dated 20.06.2012. He relied on the decision of ***RDB Textiles Ltd. Vs. Commissioner of Central Excise & Service Tax, Kolkata-IV 2018 (359) ELT 433(S.C)*** to say that there must be intention on the part of the service provider to enhance the value of services by use of such name or mark. He also relied on the decision of the Hon'ble Andhra Pradesh High Court in the case of ***Maheshwari Industries vs. Commissioner (Appeals-II) Cus, Hyderabad 2017 (352) ELT 338 (A.P.)*** to say that if use of brand name or trade name is not entitled for the purpose of indicating connection in course of trade between such specified goods and the person using such name or mark, then same may not fall within the definition of expression brand name or trade name. Therefore, he prayed that the appellants are entitled for the benefit of abovementioned exemption notifications.

4. He further submits that the appellants are not liable to pay service tax on the gross amount of subscriptions received by them on the ground that as per the agreement between the appellants and M/s Fastway, the appellants have to collect the entire subscription from the customers and as per invoices raised by the Fastway to the appellants, the appellant remit a pre-agreed portion of the consideration received by the appellants to Fastway. The appellants retain only a portion of the amount received from

the subscribers. It is his contention that if the appellant is asked to pay service tax then it will be double tax on the same activity. He also relied on the decision of ***UOI vs. Intercontinental Consultants and Technocrats Pvt. Ltd. – 2018 (10) GSTL 401 (SC)***. He also relied on the decision of the Tribunal in the case of ***Market Committee vs. CCE-2018 (10) GSTL 363 (Tri.-Chan.)***. He also relied on the decision of ***Transpek Silox Industries Pvt. Ltd. Vs. CCE 2018 (17) GSTL 434 (Tri.-Ahmd.)*** to say that the appellant is liable to pay service tax only the amounts actually retained by the appellants and not the amounts remitted to the MSO, i.e. Fastway.

5. He further submitted that the extended period of limitation is not invocable as there was a bonafide belief on the part of the appellants that they are not liable to discharge service tax, as they are entitled for exemption under Notification No. 6/2005-ST dated 1.03.2005. Moreover, there was a confusion in the entire industry with respect to the liability of local cable operators to discharge the service tax. For this, he relied on the decision of the Tribunal in the case of ***Trans Yamuna Communications Pvt. Ltd. Vs. CST – 2017 (52) STR 31 (Tri.-Del.)***, ***Krishna Satelite Cable Network vs. CCE 2008 (12) STR 605 (Tri.-Del.)***, ***Dinesh Cable Network vs. CCE 2012 (4) TMI 471 (CESTAT, New Delhi)*** and ***Final Order dated 27.07.2017 in the case of Panchsheel Communication Network Pvt. Ltd. Vs. CST in Appeal No. ST/57904/2013***.

6. He further submitted that the demand has been incorrectly calculated and demands have been made against the appellants by

invoking the provision of Section 72 of the Finance Act, 1994. In fact, the appellants were never given time to supply the data of receipt of subscription from the subscribers and demand has been confirmed on the basis of the data supplied by MSO. In that circumstances, if demand is to be calculated, the same is to be calculated on the basis of the subscriptions received by the appellants from the subscribers for providing cable network services, and accordingly, the demand is to be calculated. Therefore, the best judgement assessment is not sustainable in the light of the decision of the Tribunal in the case of ***Shubham Electricals vs. CCE 2015 (40) STR 1034 (Tri.-Del.)*** which has been affirmed by the Hon'ble High Court reported in 2016 (42) STR J312 (Del.).

7. In alternate, it is his submission that if the appellants are liable to pay service tax on the gross amount of subscriptions received from the subscribers, in that circumstances, the amounts remitted to MSO on which MSO has paid service tax, the appellants are entitled to avail cenvat credit of service tax paid by MSO. To support this contention, he relied on the decision of the Hon'ble Supreme Court in the case of ***Formica India Division vs. CCE 1995 (77) ELT 511 (S.C)*** and the decision of the Tribunal in the case of ***Supreme Industries vs. CCE 2008 (226) ELT 354 (Tri.-Mum.)*** and ***EM Services (I) Pvt. Ltd. Vs. CCE 2018 (10) TMI 1066 CESTAT Mumbai.***

8. He further submitted that in these circumstances, no penalty is imposable on the appellants.

9. On the other hand, the Ld. AR opposed the contention of the Ld. Counsel and submits that it is well known that the appellants are providing cable operators services and the said service is taxable during the impugned period. He also submits in terms of Section 67 of Finance Act, 1994 the appellants are liable to pay service tax on the gross value of the service is provided by them. He also submits that as the network flashed the signals have been provided by M/s Fastway on the screen, in that circumstances, the appellants are providing branded service and no exemption is available to the appellants. Therefore, the appellants are liable to pay service tax on the gross value of subscriptions received from the subscribers without any exemption which the appellants were failed to do so. Therefore, the extended period of limitation is rightly invoked.

10. Heard the parties and considered the submissions.

11. On careful consideration and submission made by both sides, the following issues emerges as under:-

- a) Whether the appellants are providing branded service or not? Consequently they are entitled for exemption under Notification No. 6/2005-ST dated 01.03.2005 and Notification No. 33/2012-ST dated 20.06.2012.
- b) Whether the extended period of limitation is invokable or not?
- c) Whether the best judgement under Section 72 of the Finance Act, 1994 has been assessed correctly or not?

d) Whether the appellants are liable to pay service tax on the gross value of the services provided by them or not?

e) Whether the appellants are entitled for cenvat credit of service tax paid by the MSO or not?

12. Whether the appellants are providing branded service or not?

Consequently they are entitled for exemption under Notification No. 6/2005-ST dated 01.03.2005 and Notification No. 33/2012-ST dated 20.06.2012.

In this case, the appellants are cable operator and providing cable services to the subscribers on the basis of signals received from the MSO. The subscriber has not asked for any brand for providing the said services. In fact, the appellant is also not providing any branded service as MSO is supplying signal to the appellants which has been transmitted to the subscribers, in that circumstances, there is no relation of brand name to the ultimate customers. Therefore, we hold that the appellants are not providing any branded service to the subscribers and the said issue has been examined by the Hon'ble Apex Court in the case of **RDB Industries (supra)** wherein the Hon'ble Apex Court came to the occasion to examine the issue of brand name and observed as under:-

*"18. It is obvious that, on the facts of these cases, what is in fact affixed to the jute bags is the name of the procurer agency in question such as the FCI, the State Government of Punjab and so on, the crop year, the name of the jute mill concerned, its BIS certification number and the statement that the food grains are manufactured in India. It is clear that all the aforesaid markings have, on the pain of penalty, to be done by the manufacturers of the jute bags, given the Jute Control Order and the requisition orders made thereunder. Obviously, such markings are made by compulsion of law, which are meant for identification, monitoring and control by Governmental agencies involved in the PDS. Neither do such*

*markings enhance the value of the jute bags in any manner nor is it the intention of the appellants to so enhance the value of jute bags, which is necessary if Excise duty is to be imposed. This flows from the expression "...for the purpose of indicating, or so as to indicate, a connection in the course of trade between the product and some person using such name or mark...". In the present case, the markings on the jute bags are not for the purpose of indicating a connection in the course of trade between the jute bag and some person using such name or mark. The markings are by compulsion of law only in order that Governmental Authorities involved in the PDS may identify and segregate the aforesaid jute bags. This being the case, it is obvious that there is no "brand name" involved in the facts of the present cases.*

**22.** *The facts of these cases are far from the facts in Kohinoor Elastics (supra). In Kohinoor Elastics (supra), it was found that, as a matter of fact, the customer wanted the brand name affixed on the product because he wanted the consumer to know that there is a connection between the product and him. This is very far from the facts of the present case, in that, as has been held by us above, it is clear that the markings required on the jute bags are compulsory, being required by the Jute Commissioner, and are not for the purpose of enhancing the value of the jute bags by indicating a connection in the course of trade between the aforesaid products and the manufacturer of those products."*

Further, in the case of ***Maheshwari Industries (supra)***, the Hon'ble Apex

Court observed the criteria for use of brand name which is as follows:-

*"(1) It must be a name or mark such as symbol, monogram, label, signature or invented word or writing;*

*(2) It must be used in relation to such specified goods, for the purpose of indicating a connection in the course of trade between such goods and some person using such name or mark, with or without any indication of the identity of that person; and*

*(3) The mere fact that the specified goods manufactured by a person bear a brand name or trade name of another manufacturer, is not sufficient to conclude that those goods are manufactured by such other manufacturer or trader.*

**19.** *Therefore, it is clear that a person may be taken to be manufacturing specified goods, bearing a brand name or trade name only if the name, mark or symbol used as such, is intended to indicate a connection in the course of trade between such specified goods and some person using such mark or name. If the use of the brand name or trade name is not intended for the purpose of indicating a connection in the course of trade between such specified goods and the person using such name or mark, then the same may not fall within the definition of the expression brand name or trade name under the Explanation under paragraph 5 of the Exemption Notification."*

In view of the above cited judicial pronouncements, we hold that the appellants are not providing any branded services, therefore, the appellants are entitled to avail the benefit of exemption Notification No.



6/2005-ST dated 01.03.2005 and Notification No. 33/2012-ST dated 20.06.2012.

b) Whether the extended period of limitation is invokable or not?

We find that the appellants were under bonafide belief that they are not liable to pay service tax as they are entitled for benefit of exemption under notification no. 6/2005-ST dated 01.03.2005 and Notification No. 33/2012-ST dated 20.06.2012, therefore, they did not pay service tax. Moreover, there was confusion in the industry during the relevant period whether the appellants are liable to pay service tax or the MSO liable to pay service tax on their activity, in that circumstances, the benefit of doubt goes in favour of the appellants. Therefore, we hold that the extended period is not invokable as held by the Tribunal in the case of ***Trans Yamuna Communication Pvt. Ltd. Vs. Commissioner of Service Tax, Delhi – 2017***

**(52) STR 31 (Tri.-Del.)** wherein this Tribunal observed as under:-

*“4. I have heard both the sides and perused the appeal records. As noted above, the tax liability is not in dispute. It appear that the scope of activities undertaken by the appellant is not falling under generally understood activities of cable operator who is involved in distribution of television signals to various clients. Admittedly, the television signals received from satellite is managed and handled through various layers of persons/activities till it reaches the ultimate customer. The appellant's role is as an intermediary and apparently there could be a bona fide belief on their part regarding the tax liability under the said category. As already noted that they are not acting as a local cable TV operator in transmitting signals to the clients. Neither they are involved in receiving satellite signals as a MSO. The Finance Act, 1994 borrows the definitions of 'Cable operator' and 'Cable service' from Cable Television Network (Regulation) Act, 1995. Considering scope of definition under Section 2(aa) of the said Act there is a possibility of bona fide belief for non-tax liability. Considering the ratio followed by the Tribunal in the abovementioned cases and also considering the facts of the present case, I find that it is a fit case for invoking the provision of Section 80 for waiver of penalties imposed on the appellant. Accordingly, the penalties are set aside and the appeal is allowed only to that extent.”*

Therefore, no penalty is imposable on the appellants.

c) Whether the best judgement under Section 72 of the Finance Act, 1994 has been assessed correctly or not?

In this case, it is a fact on record, the appellants were not given time of supply the data of their activity and assessment has been done on the basis of the data supplied by the MSO which is not correct, therefore, we hold that the assessment under Section 72 of the Finance Act, 1994 is not correct. In that circumstances, the impugned demand is not sustainable, but the appellants are directed to provide the data for their activity within the period of limitation to the adjudicating authority within 30 days of the communication of this order and on the basis of the data supplied by the appellants, the correct service tax liability shall be determined by the adjudicating authority. Therefore, for that purpose, the matters need to be examination at the end of the adjudicating authority.

d) Whether the appellants are liable to pay service tax on the gross value of the services provided by them or not?

We find that in terms of Section 67 of the Finance Act, 1994, the appellants are liable to pay service tax on the gross value of subscription received by them. The said view having the support of the Hon'ble Apex Court in the case of ***Intercontinental Consultants and Technocrats Pvt. Ltd*** (*supra*) wherein the Hon'ble Apex Court observed as under:-

*“24. In this hue, the expression ‘such’ occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing ‘such’ taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such ‘taxable service’. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider ‘for such service’ and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.”*

Admittedly, in this case, the appellants have received subscriptions from the subscribers for providing the services, on the said amounts, the appellants are liable to pay service tax.

e) Whether the appellants are entitled for cenvat credit of service tax paid by the MSO or not?

We find that the out of the total amount received by the appellants, some amounts of total subscriptions, the appellants are remitting to the MSO on which the MSO is paying service tax, therefore, the signal provided by the MSO to the appellant is an input services for the appellants. Therefore, the service tax paid by the MSO is available as cenvat credit to the appellants. In these circumstances, we hold that the appellants are entitled to avail cenvat credit of the service tax paid by the MSO.

13. In view of the above, the following order is passed:-

- a) the appellants are entitled for exemption under Notification No. 6/2005-ST dated 01.03.2005 and Notification No. 33/2012-ST dated 20.06.2012.
- b) the extended period of limitation is not invokable. Consequently, no penalty is imposable on the appellants

c) the appellants are liable to pay service tax on the gross value of services received by them and is entitled to avail cenvat credit of service tax paid on the amount remitted to the MSO.

d) The adjudicating authority shall quantify the demand for the period within the period of limitation on production of data of services provided by the appellants of cable services to the subscribers within the 30 days of receipt of this order on which the appellant shall paid the service tax if payable.

12. In view of the above, the appeals are disposed of.

*(Order Pronounced on 22.02.2019)*

**(Bijay Kumar)**  
Member (Technical)

**(Ashok Jindal)**  
Member (Judicial)

G.Y.