IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
[COURT III : Division Bench B1]

Appeal Nos.: ST/40123, 40496, 40713/2014

Sl. No.	Appeal No.	Appellant	Respondent
1.	ST/40123/2014	The General Manager, (BSNL Cellular Mobile Services) CMTS, M/s. Bharat Sanchar Nigam Ltd., Tiruchirapalli	The Commissioner of G.S.T. & Central Excise, Tiruchirapalli
Arising out of Order-in-Original No. 12/2013-ST dated 29.11.2013 passed by the Commissioner of Central Excise & Service Tax, Tiruchirapalli			
2.	ST/40496/2014	The General Manager, M/s. Bharat Sanchar Nigam Ltd., Thanjavur	The Commissioner of G.S.T. & Central Excise, Tiruchirapalli
Arising out of Order-in-Original No. 17/2013-ST dated 20.12.2013 passed by the Commissioner of Central Excise & Service Tax, Tiruchirapalli			
3.	ST/40713/2014	M/s. Bharat Sanchar Nigam Ltd. (Landline Services), Tiruchirapalli	The Commissioner of G.S.T. & Central Excise, Tiruchirapalli
Arising out of Order-in-Original No. 01/2014-ST dated 10.01.2014 passed by the Commissioner of Central Excise & Service Tax, Tiruchirapalli			

Appearance:-
Shri. S. Durairaj, Advocate
Shri. R. Balagopal, Consultant
for the Appellant

Shri. K. Veerabhadra Reddy, ADC (AR)
for the Respondent

CORAM:
Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing/Decision: 20.12.2018

Final Order Nos. 43197-43199 / 2018

Per Bench :

The appellants herein have opted for Centralized Registration under the category of 'Telephone Cellular Mobile Services' for the

provision of services in relation to cellular mobiles rendered from their seventeen Secondary Switching Areas (SSA) falling under the jurisdiction of Tamil Nadu Telecom Circle.

2.1 Apart from providing service to their subscribers, appellants were also providing Interconnection Service to other telecom operators. Such Interconnect Usage Charges (IUC) were brought within the ambit of service tax under the category of "Telecommunication Service" with effect from 01.06.2007. Appellants were paying service tax from that date on the amounts received from their telecom operators for the provision of Interconnection Services.

2.2 It emerged that appellants had provided Interconnection Service to their own Landline segment also and had received an income thereof during the period 2007 to 2012. The Department took the view that the appellants are required to pay the service tax on such amounts received from the Landline segment of M/s. BSNL.

2.3 Accordingly, three Show Cause Notices were issued for various periods to these appellants which have culminated in the following adjudication Orders :

(i) General Manager (BSNL Cellular Mobile Services) CMTS, M/s. BSNL Ltd., Trichy

Impugned Order : O-in-O No. 12/2013-ST dated 29.11.2013

Period of dispute: June 2007 to September 2011

Demand confirmed: Service tax of Rs. 19,18,95,836/- with interest.

Penalties imposed: under Sections 77 and 78 of the Finance Act, 1994.

(Appeal No. ST/40123/2014)

(ii) General Manager, M/s. BSNL Ltd., Thanjavur

Impugned Order: O-in-O No. 17/2013-ST dated 20.12.2013

Period of dispute: June 2007 to March 2012

Demand confirmed: Service tax of Rs. 2,05,80,048/-

Penalties imposed: under Sections 77 & 78 ibid.

(Appeal No. ST/40496/2014)

(iii) M/s. BSNL (Landline Services), Trichy

Impugned Order: O-in-O No. 01/2014-ST dated 10.01.2014

Period of dispute: October 2007 to March 2012

Demand confirmed: Service tax of Rs. 2,00,50,089/-

Penalties imposed: under Sections 77 & 78 ibid.

(Appeal No. ST/40713/2014)

3. When the matter came up for hearing, on behalf of the three appellants, Ld. Advocate Shri. S. Durairaj made oral and written submissions which can be broadly summarized as under :

(i) Interconnected Usage Service provided by one telegraph authority to another, was brought into the tax net with effect

from 01.06.2007 by covering services provided to any person by the telegraph authority in relation to Telecommunication Service. However, in the appellants' case, the appellants are not providing such services to another telegraph authority, but only to their own Landline segment, which is undeniably a part of M/s. BSNL itself;

(ii) The adjudicating authority has confirmed the demand on the ground that in Section 65(105)(zzzx) of the Finance Act, 1994, it is not explicitly mentioned that service receiver and service provider must be two different persons. However, this reasoning of the Commissioner is not sustainable since in view of the clarification issued by the Board vide Circular dated 12.03.2007 wherein it is clarified that Interconnected Usage Service is service between two telegraph authorities and it is thus taxable from 01.06.2007;

(iii) In any case, since appellant is providing service to its own Landline segment, it is a case of self-service to own entity and therefore, not taxable. This interpretation of the law has been reiterated in a number of Tribunal judgements, for example :

- *Precot Mills Ltd. Vs. C.C.E., Tirupati – 2006 (2) S.T.R. 495 (Tri. – Bang.);*

- *Indian Oil Corporation Vs. C.C.E., Patna – 2007 (8) S.T.R. 527 (Tri. – Kol.);*
- *Senior Terminal Manager, I.O.C. Ltd. Vs. C.C.E., Tirunelveli – 2009 (13) S.T.R. 287 (Tri. – Chennai).*

(iv) For falling within the fold of Section 65(105) of the Finance Act, 1994, the service must be provided and received by two different persons. Even after the introduction of negative list of services with effect from 01.07.2012, as per Section 65(B)(44) of the Act "service" means "any activity carried out by a person for another for consideration;" this interpretation can be applied retrospectively for the earlier period also.

(v) The appellant is a public sector undertaking wholly owned by the Government of India. Their records are scrutinized throughout India by the Comptroller and Auditor General of India and also by the Internal Statutory Auditors. The appellants were under the *bona fide* belief that there cannot be any service tax liability on such inter-segment income. For these reasons, the allegation that appellants had deliberately withheld information about inter-segment income with an intention to evade tax is not sustainable. Hence, the demands are also hit by limitation.

4. On the other hand, Ld. AR Shri. K. Veerabhadra Reddy appearing on behalf of the respondent, supports the impugned Order. He also made oral and written submissions which can be broadly summarized as under :

(i) Appellants have contended that the service provided by them is a service to self. However, as per Section 68 of the Finance Act, 1994, with regard to the payment of service tax "every person providing taxable services to any person shall pay service tax at the rate specified in Section 66 in such manner and within such period as may be prescribed….". Hence, every person providing taxable service to any person is liable to pay service tax.

(ii) Further, in terms of Section 65(105)(zzzx) of the Act "taxable service" means "any service provided or to be provided to any person by the telegraph authority in relation to Telecommunication Service." It is therefore clear that for services to be taxable under the above category, the following conditions will have to be satisfied :

a. The service should be provided by a telegraph authority;
b. The service should be in relation to Telecommunication Service;

c. The service should be provided to 'any person'.

(iii) The term 'person' has not been defined in the Finance Act, 1994 as it existed prior to 01.07.2013 or in any Allied Act and hence, has to be understood as defined in the General Clauses Act. The term 'person' is defined in Section 3(42) of the General Clauses Act, 1897 as "Person shall include any company or association or body of individuals, whether incorporated or not."

(iv) From the above statutory provisions as provided under Section 65(105)(zzzx) of Chapter V of the Finance Act, 1994, the term 'person' provided for the service receiver has been mentioned without any qualification and therefore, the requirement of the service provider and the service receiver being two separate legal entities is not explicitly envisaged in the definition of taxable service for Telecommunication Services as it is applicable for the period covered under this Show Cause Notice. Hence, all the parameters for a service to be taxable under the provisions of the Finance Act, 1994 are satisfied in this case.

(v) As per Section 3(6) of the Indian Telegraph Act, 1885 :

"6) "telegraph authority" means the Director General of [Posts and Telegraphs] and includes any officer empowered by him to perform all or any of the functions of the telegraph authority under this Act;"

In the instant case, both M/s. BSNL (Landline) and M/s. BSNL (CMTS) qualify as telegraph authorities and the inter-segmental services are clearly treated as service between these different segments which provide two entirely different kind of services and the revenue/expenses on account of such services is also shown as income/expenditure in the financial statements of both M/s. BSNL (Landline) and M/s. BSNL (CMTS). As already stated, both the above two segments of M/s. BSNL qualify as 'persons' within the context of definition under Section 65(105)(zzzx) of the Finance Act, 1994.

(vi) The definition of 'service' under Section 65(B)(44) of the Act is applicable with effect from 01.07.2012 consequent to the negative list based levy of service tax and the same cannot be applied to services provided prior to the said date. Same is the case with the explanation given in the Educational Guide on Taxation of Services published by TRU, CBEC which cannot be retrospectively applied for the past period.

(vii) In terms of Section 70 of Chapter V of the Finance Act, 1994, ever person providing taxable service shall himself

assess the tax payable on the taxable service provided by them and furnish the relevant details in the statutory returns, to be filed with the jurisdictional Range Office. However, the appellant had deliberately failed to disclose the material facts to the knowledge of the Department. The non-payment of service tax was brought out only by the verification conducted by the Department and hence, this case merits invocation of extended period of limitation and penalty under Section 78 of the Finance Act, 1994.

5. Heard both sides and have gone through the facts.

6.1 The services provided by the appellants to their Landline segment, namely, Interconnect Usage Charges and the consequent collection of Interconnect Usage Charges, have been considered as taxable under the category of Telecommunication Charges defined in Section 65(109a) ibid. While the said definition is an expansive and detailed one, there is no definition of what are Interconnect Usage Charges.

6.2 The Telecom Regulatory Authority of India vide their Notification dated 29.10.2003 have issued "The Telecommunication Interconnection Usage Charges Regulation, 2003" (hereinafter referred to as 'The Regulation') which supersedes the earlier

Regulation dated 24.01.2003 (1 of 2003) and its amendments dated 27.03.2003 (1st amendment) and 16.06.2003 (2nd amendment). The Regulation is for the purpose of covering arrangements among service providers for the payment of Interconnection Usage Charges for Telecommunication Services, covering Basic Service that includes WLL (M) Services, Cellular Mobile Services and Long Distance Services (STD/ISD) throughout the territory of India. Among the definitions in the Regulation, the following are worth reproducing :

> ***"2.(viii)*** *"Interconnection" means the commercial and technical arrangements under which service providers connect their equipment, networks and services to enable their customers to have access to the services and networks of* <u>*other service providers.*</u>
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> ***2.(x)*** *"Interconnection Usage Charge (IUC)" means the charge payable by one service provider to one or more service providers for usage of the network elements for origination, transit or termination of the calls.*
>
> ***2.(xi)*** *"Interconnection Provider" means the service provider to whose network an interconnection is sought for providing Telecommunication Services.*
>
> ***2.(xii)*** *"Interconnection Seeker" means the service provider who seeks interconnection to the network of the interconnection provider."*

6.3 It is also pertinent to note that in the preamble of the TRAI Telecommunication Interconnection Usage Charges Regulation,

2003, the aforesaid TRAI Notification dated 24.01.2003 clarifies the purpose of the Notifications, namely :

> *"… to fix the terms and conditions of interconnectivity between Service Providers, to ensure effective interconnection between different Service Providers and to regulate arrangements amongst Service Providers of sharing their revenue derived from providing telecommunication services, the Telecom Regulatory Authority of India hereby makes the following Regulation".*

6.4 The Telecommunication Interconnection Usage Charges (Thirteenth Amendment) Regulations, 2017 were issued by TRAI Notification dated 19.09.2017 in the Explanatory Memorandum to these 2017 Regulations. The definitions of "Interconnection" and "Interconnection Charges" were further clarified as under :

> *"**A. Interconnection***
>
> 1. *Interconnection allows subscribers, services and networks of one service provider to be accessed by subscribers, services and networks of the other service providers. If networks are efficiently interconnected, subscribers of one network are able to seamlessly communicate with those of another network or access the services offered by other networks. Without an effective interconnection, the market would develop as discrete islands and economic benefits associated with market expansion and liberalization would be limited. For competition to develop and the market to evolve efficiently, it is essential that subscribers of one network communicate with those of another network.*
> 2. *In a broader sense, the term interconnection refers to the technical and commercial arrangement under which service providers connect their equipment, networks and services to enable their subscribers to have access to the subscribers, services and networks of other service providers. Interconnection is the lifeline of telecommunications. It is one of the foundations of viable competition which in turn is the main driver for growth and innovation in telecommunications markets. Good interconnection arrangements promote efficient infrastructure development, providing incentives for operators to build networks and use other networks.*

B. Interconnection Usage Charges (IUC)

3. *Interconnection Usage Charges (IUC) are wholesale charges payable by a Telecom Service Provider (TSP) to another Telecom Service Provider (TSP), for terminating or transiting/carrying a call from its network to the network of the receiving TSP. The IUC mainly consists of termination charges, origination charges and carriage/transit charges. Briefly these are as follows:"*

6.5 It is thus seen that TRAI has again, vide aforesaid 2017 Regulations, continued to reiterate that Interconnection Usage Charges are only payable by the <u>service provider</u> to another Telecom Service Provider for terminating or transiting/carrying a call from between the networks of two service providers.

6.6 Even the CBEC vide their Circular No. 91/2/2007 dated 12.03.2007 has clarified as under :

> *"<u>The interconnection service is provided by one telegraph authority to another to enable the telephone subscribers of these telegraph authorities to connect with each other</u>. Interconnection in technical terms means the commercial and technical arrangements under which service providers connect their equipment, networks and services to enable their customers to have access to the customers, services <u>and networks of other service providers</u>."*

6.7 Viewed in this light, Interconnection Usage Charges would only be such charges levied by a service provider on another service provider. This interpretation is further reinforced by the fact that the said Regulations include the definitions of "Interconnection Provider" as a <u>service provider</u> to whose network interconnection is

sought and "Interconnection Seeker" as a service provider who seeks such interconnection.

7. From the facts on record, we find that the disputed services pertain to interconnectivity provided by M/s. BSNL, Cellular Mobile Telephone Services (CMTS) Division and M/s. BSNL, appellants herein to their own landline network. Surely, by no stretch of imagination can these two Divisions of M/s. BSNL be termed as two separate service providers for the purposes of the definitions contained in the aforesaid TRAI Regulations that we have just analyzed, etc.

8.1 In the present scenario, most, if not every, service provider extends a gamut of connectivity services like landline connectivity, connectivity on mobiles through GSM, CDMA connectivity, data and voice through optical fibre and so on. A service provider like M/s. BSNL may be providing one or more of these connectivities as may be subscribed to by their subscribers. But the important point to be noted is that when the CMTS Division of BSNL is providing interconnectivity to their Landline Division, the service provider BSNL is only providing service to itself. Thus, it becomes a case of service to oneself.

8.2 The Tribunal in the case of *Precot Mills Ltd. (supra)* has held that when one renders service to oneself, there is no question of leviability of service tax; that there is no client-principal relationship in transactions and service tax is not leviable. The relevant portion of the decision is reproduced as under :

> "**5.** *We have gone through the records of the case carefully. While dropping the proceedings against the appellants, the Asst. Commissioner in his order dated 27-6-2002 has taken into consideration the following facts :-*
>
> > *(i) The service provider and the service receiver belong to the same Corporate entity known as Precot Mills Ltd. with a single certificate of incorporation.*
> >
> > *(ii) Share holding is for the Corporate body and balance sheet is prepared for the whole entity and not unit-wise.*
> >
> > *(iii) For service tax to be leviable, the provider and the client of Management Consultancy Services need to be two separate legal entity as construed from Section 65(72) of the Act which is not the situation in the instant case.*
> >
> > *(iv) It is usual practice that for internal accounting purposes and apportioning cost inter unit book adjustment are made in a corporate body. The Commissioner has not accepted the contention of the appellants and held that the internal accounting system of the appellants will not have any bearing on the payment of service tax. In our view, for the leviability of service tax, there should be a service providers and service receiver. As held by the Original authority (Asst. Commissioner) in the present case both the service provider and the service receiver are part of the corporate entity which is known as M/s. Precot Mills Ltd. It was emphasised that the debit note was issued only to evaluate the performance of Dyeing Unit as each unit is a separate profit center. In the case laws cited by the learned Chartered Accountant, the Hon'ble High Court of Calcutta has held that when the club space is allowed to be occupied by any member or his family members or by his guest for a function by constructing a mandap, the club cannot be called as 'mandap keeper' for the purposes of service tax. It was held that principally there should be existence of two sides/entities for having transaction as against consideration. In a member's club, there is no question of two sides. Members and Club both are the same/entity. One may be called as principal when the other may be called as agent, therefore, such*

> *transaction in between themselves cannot be recorded as income, sale or service as per applicability of the revenue tax of the country. Hence, members club are not liable to pay service tax in allowing its members to use its space as mandap. The ratio of the above case law is clearly applicable to the present case. M/s. Precot Mills Ltd. is a Corporate entity. It has got various units which function as separate profit centers. When service is rendered by one unit to the other, debit note is raised for the value of service in order to evaluate the performance of a particular unit. Ultimately there is only one Balance sheet for the legal entity for M/s. Precot Mills Ltd. and not for the separate unit. In other words, the appellants, M/s. Precot Mills Ltd. do not receive any valuable consideration for services rendered by one unit of the appellant to the other unit, in view of the fact that the each unit is part of the same legal entity which is the appellant. To put it differently, when one renders service to oneself, as in the present case, there is no question of leviability of service tax. The Asst. Commissioner's order is correct and legal. Hence we do not find any merit in the impugned orders of the Commissioner which ignore the main point that there is no client relationship in the present transactions. In these circumstances, no penalty is leviable. Thus we allow the appeal with consequential relief."*

8.3 The ratio laid down in *Precot Mills Ltd. (supra)* has been followed/relied by the Tribunal in a number of subsequent decisions, for eg. :

- *Followed in 2007 (8) S.T.R. 527 (Tri. – Kolkata);*
- *Followed in 2010 (19) S.T.R. 424 (Tri. – Chennai);*
- *Relied in 2010 (20) S.T.R. 847 (Tri. – Kolkata);*
- *Followed in 2012 (27) S.T.R. 53 (Tri. – Del.);*
- *Relied in 2012 (27) S.T.R. 145 (Tri. – Del.);*
- *Relied in 2013 (30) S.T.R. 502 (Tri. – Del.);*
- *Relied in 2013 (32) S.T.R. 113 (Tri. – Ahmd.);*
- *Relied in 2014 (35) S.T.R. 374 (Tri. – Kolkata);*
- *Followed in 2014 (36) S.T.R. 212 (Tri. – Bang.).*

9. In view of the discussions hereinabove, we hold that the charges levied by one Division of M/s. BSNL to another and that too by way of debit notes, is only an internal financial adjustment which cannot, by any stretch of imagination, be termed as "Interconnection Usage Charges" or as a taxable service for the purpose of levying service tax. This being so, the impugned Orders to the contrary cannot sustain and will require to be set aside *in toto*, which we hereby do.

10. The appeals are allowed with consequential benefits, if any, as per law.

(Operative part of the order was pronounced in open court)

(Madhu Mohan Damodhar) Member (Technical)

(Sulekha Beevi C.S.) Member (Judicial)

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