

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, CHENNAI**

**Service Tax Miscellaneous Application No. 40284/2023
And
Service Tax Appeal No.41929/2017**

(Arising out of Order in Original No. CHN-SVTAX-003-COM-01-2017-18 dated 22.5.2017 passed by the Commissioner of Service Tax – III, Chennai)

M/s. Vodafone Idea Ltd.

1045/1046
Avinashi Road
Coimbatore – 641 108.

Appellant

Vs.

Commissioner of GST & Central Excise

No. 6/7, A.T.D. Street, Race Course
Coimbatore – 641 018.

Respondent

APPEARANCE:

Ms. Krithika Jaganathan, Advocate for the Appellant
Shri N. Satyanarayanan, AC (AR) for the Respondent

CORAM

Hon'ble Shri P. Dinesha, Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40720/2023

Date of Hearing : 09.08.2023

Date of Decision: 25.08.2023

Per M. Ajit Kumar,

This appeal is against Order in Original No. CHN-SVTAX-003-COM-01-2017-18 dated 22.5.2017 passed by the Commissioner of Service Tax, Chennai.

2. Brief facts of the case are that the appellants herein are providing taxable service under the category of 'Telephone Services, Business Auxiliary Services, Business Support Services, Maintenance or Repair Service, Intellectual Property Service, Transport of Goods by road and

sponsorship service'. Among the services rendered by the appellant, major revenue comes from telecommunication service basically telephone services. Telephone services were brought under the service tax net by the Finance Act, 1994 (FA 1994) vide Notification No. 1/94 dated 28.6.1994.

2.1 The appellant raises bills against subscribers in respect of cellular mobile telephone service for the gross amount, The trial balance of the appellant for the financial year 2004 – 2005, 2005 – 2006 and 2006 – 2007 were scrutinized in detail. It was found that there was a huge difference between credit balance items in the nature of subscriber service charges shown in the trial balance and the value of taxable services billed during the financial year 2004 – 2005, 2005 – 2006 and 2006 – 2007 as furnished by the appellant. From the half-yearly ST-3 returns filed every half year during the financial year 2004 – 2005, 2005 – 2006 and 2006 – 2007, it appeared that the appellant have not assessed and paid appropriate service tax in respect of the services being rendered by them. This is manifest when the service tax and education cess paid in respect of services rendered is juxtaposed with the gross value of service received during the financial year 2004 – 2005, 2005 – 2006 and 2006 – 2007. Appellant has incorrectly computed the service tax by not taking into account the entire gross value of service rendered and received. As mentioned *ibid* as per section 67 of the FA 1994, as amended, the value of any taxable service shall be the gross amount charged by the service provider for such services provided for the purpose of charging service tax. However, it appeared that the appellant has adopted assessable value

which was less than the actual gross amount received during the financial year 2004 – 2005, 2005 – 2006 and 2006 – 2007. From the above, it appeared that the appellant has failed pay appropriate service tax on the gross amount charged and received as value of service provided during the financial year 2004 – 2005, 2005 – 2006 and 2006 – 2007. It appeared that the appellant has willfully suppressed the value of taxable services with an intention to evade payment of service tax. But for the timely investigations conducted by the department, the entire gamut of evasion of service tax by the appellant would not have come to light. Hence Show Cause Notice dated 14.10.2009 was issued to the appellant proposing to demand service tax to the tune of Rs.8,71,60,499/- (inclusive of education cess) along with appropriate interest on a differential taxable value of Rs 77,59,83,198.06 and for imposing penalty. After due process of law, the adjudicating authority dropped portion of the demand and confirmed the balance demand amounting to Rs.6,59,55,769/- along with appropriate interest and imposed penalties under sec. 77 and 78 of the FA 1994. Hence this present appeal by the appellant.

3. No cross-objections have been filed by the respondent-department.

4. We have heard learned counsel Ms. Krithika Jaganathan for the appellant and Shri N. Satyanarayanan, learned Assistant Commissioner (AR) for the department.

5. The learned counsel Ms. Krithika Jaganathan submitted that the present demand is based entirely on the differential value arising out of the revenue figures furnished in the Trial Balance as compared to

the value of taxable services as furnished in the ST-3 returns by the appellant. She submitted that the Trial Balance and Profit & Loss Account for the financial year is prepared on 'accrual basis' as per the relevant provisions of the Companies Act, 1956. Thus, the books of accounts are maintained on the presumption of the income due to them, regardless of the receipt of the income at the time when the books of accounts had been prepared whereas the applicable service tax is to be paid on receipt basis as provided in Rule 6 of the Service Tax Rules, 1994 (STR 1994). Thus, both the Trial Balance and Profit and Loss Account of the Appellant can never reflect similar values, as they are meant for different purposes and adopt different accounting mechanisms. She further submitted that no allegation of suppression can be foisted against the Appellant since the demand is based on the books of accounts and financial statements scrupulously maintained by them. No penalty can be imposed as there has been no contravention of any of the provisions of the Act or the concerned rules. She hence prayed that the impugned order may be set aside.

6. Shri N. Satyanarayanan, learned Assistant Commissioner (AR) for the department has reiterated the points stated in the impugned order.

7. We have heard the rival parties and carefully perused the appeal. We find that the dispute relates to discrepancies between credit balance of subscriber service charges shown in the Trial Balance and the value of taxable services during the financial years 2004 – 2005, 2005 – 2006 and 2006 – 2007 as noticed in the ST-3 Returns, by the department. The preliminary objection raised by the appellant need to

be dealt with before taking up the other legal issues as brought up by the rival sides.

7.1 The preliminary points raised by the appellant are:-

(i) The SCN was based on the bald observation that the amounts in Trial Balance differed from the amounts in the ST-3 Returns. It is a settled legal position that no demand can be raised on the basis of values reflected in financial statements and the present proceedings merit to be set aside on this ground alone.

(ii) The onus of establishing taxability and to show that there is understatement of consideration is always on the Revenue. The Department has not proved anything to this effect, and thus, the entire demand ought to be dropped.

(iii) The Trial Balance and Profit & Loss Account for the financial year is prepared on 'accrual basis' as per the relevant provisions of the Companies Act, 1956, while the basis for service tax liability was dependent on the receipt of payments prior to 01.04.2011 as is clear from Rule 6(1) of the STR 1994.

7.1.1 We are not in agreement with the appellants assertion that no demand can be raised on the basis of values reflected in financial statements, especially a Trial Balance which is the issue in this case. It is not denied by the appellant that the document relied upon by the department is a Trial Balance of the company itself. A Trial Balance lists the balances of all general ledger accounts of a company at a certain point in time. It is hence drawn based on the facts as available in the company's ledgers including the 'debtors ledger' which is so very crucial in determining the actual amount received for the output

services and to assess the correctness of duty paid on receipt basis, following acceptable accounting standards. A look at the Trial Balance allows the department to scrutinize the accounts for a particular period of time which need not be the financial year as in a regular Annual Balance Sheet. Hence the Trial Balance to that extent contains valuable information, which may be relevant to the facts in issue and necessary to be scrutinized as a part of the compliance verification system put in place by the department. While the Trial Balance may not be the best evidence of transactions having the same evidentiary value in its raw state as that of a final Balance Sheet, its value is not very much inferior either, having been drawn up by company officials for their very company. It can be relied upon after offering assesses an opportunity to explain the information contained therein or by some independent evidence or after being authenticated by a responsible company official that the entries represent real transactions and that the monies were paid in accordance with those entries. This would undoubtedly require the assessee's unstinted cooperation in admitting and disclosing facts within their special knowledge, at least when asked. It is also relevant to note that although Rule 5A of Service Tax Rules, 1994 was inserted vide Notification No. 45/2007, dated 28.12.2007, it prescribes a trial balance or its equivalent; and the income-tax audit report under section 44AB of the Income-tax Act, 1961 (43 of 1961), among other documents/ records for the scrutiny of the officer or audit party, as the case may be. This is only to bring out the pivotal role played by these documents/ records in the scrutiny of assessments and for time

sensitive compliance verification by the department, which was formalized by the insertion of Rule 5A *ibid*.

7.1.2 The next issue raised by the appellant is that the onus of establishing taxability and to show that there is understatement of consideration is always on the Revenue. We find that the issue in this case relates to allegations that the appellant has failed to pay appropriate service tax on the gross amount charged and received as value for service provided during the financial year 2004 – 2005, 2005 – 2006 and 2006 – 2007 as noticed from a scrutiny of the ST-3 return filed during the relevant period. We find that after introduction of the self-assessment regime it is incumbent upon the assessee to make a truthful declaration of facts in the declarations, ST-3 returns etc. made to the department. Trust brings with it responsibility. In the event of discrepancies noticed by the department in statutory returns it is the duty of the appellant to clarify the matter to the satisfaction of the officer. It is thereafter that the onus of establishing taxability lies with the department. Hence the onus of establishing the truth of what is self-assessed and declared in a statutory Return is on the assessee (appellant). The legal principle is that he who asserts must prove. So once a query has been raised by Revenue on a self-assessed return, adverse inference could be drawn against the assessee if they are not able to provide a satisfactory reply. The initial burden of rebuttal is on the assessee because the basic facts are within their special knowledge. Even as per section 106 of the Indian Evidence Act, the fact within the knowledge of a person must be proved as the burden of proof is cast upon him. The Apex Court in **A. Raghavamma v. A.**

Chenchamma [AIR 1964 S.C. 136] held "When sufficient evidence either direct or circumstantial in respect of its contention is disclosed by the Revenue, adverse inference could be drawn against the assessee, if he failed to put before the Department, material which, he was in exclusive possession. This process is described in the law of evidence as shifting of the onus in the course of a proceeding from one party to the other." When the appellant was confronted with two financial documents both prepared by them for the same period and not held to be false, one of which was a statutory return, they were duty bound to explain and reconcile the figures.

7.1.3 We find that the Point of Taxation Rules, 2011 (POTR) was notified through Budget Notification No. 18/2011 ST dated 01/03/2011. Prior to 01/04/2011 payment of service tax was on receipt basis. In other words, prior to 01/04/2011 the taxpayers were required to follow the 'Cash System of Accounting' which was changed to the 'Accrual Basis of Accounting' after the POTR was introduced. From the impugned order it is seen that the Original Authority has also accepted the same. As per section 67 of FA 1994 as amended, the value of any taxable service shall be the gross amount charged by the service provider for such services provided for the purpose of charging service tax. When the appellant failed to reconcile the information declared in the ST-3 Return with that seen in their company's Trial Balance, he confirmed the duty relying upon the decision of the Tribunal in **Ideal Security vs. CCE, Allahabad** [2011 (23) S.T.R. 66 (Tri. - Del.)] to hold that the onus of proof was on the appellant (assessee) to substantiate their claim with tangible evidence, which

they have failed to do. The appellant has submitted before us that the decision in 'Ideal Security' (supra) is factually distinguishable and is not applicable to the instant dispute. In 'Ideal Security', the dispute revolved around whether statutory payments such as ESI, PF, etc. should have been brought to tax. In this context, the Co-ordinate Bench found that the statutory documents of the assessee therein had discrepancies which ought to have been brought to service tax. In their case they have explained the different nature and reporting standards in the two documents. Therefore, the onus of proving that these sums are liable to tax is on Revenue.

7.1.4 We have examined the legal issues elaborately in the paras above. It is seen from para 5.5 of the Order in Original dated 22/05/2015 passed by the Original Authority that the appellant when asked, did not take any effort to reconcile the factual difference between the value of taxable services billed or shown in the ST-3 Return and the credit balance items in the nature of Subscriber Service Charges shown in the Trial Balances. Relevant portion of para 5.5 is reproduced below:-

"Though the assessee had argued that all the revenue heads appearing in the Trial Balance are part of the gross billings, they neither come up with any documentary evidence nor taken effort to reconcile the difference between the value of taxable services billed as shown in the ST-3 Returns and the credit balance items in the nature of Subscriber Service Charges shown in the Trial Balance during the Financial Year 2004 - 05, 2005 - 06 and 2006 - 07."

The appellant had not refuted the above charge. They have stated in their defence before us that they have responded to the query by the department stating that they prepare Trial Balance on accrual basis as per AS-1 and AS-9, whereas the ST-3 returns are prepared upon

payment of service tax on receipts basis as per Rule 6 of the STR 1994. We find that the response of the appellant shorn of verifiable facts was not adequate. The differential taxable value for the impugned period worked out on the basis of the Trial Balance and ST-3 Return was to the tune of Rs.77,59,83,198.06 for which an explanation was called for. While addressing a mixed question of law and facts, they were well within their rights to state a legal position, but it alone was inadequate for the Original Authority to determine that the Trial Balances were indeed maintained on an accrual basis and were not relevant for determining taxability of the service at that period of time. This being so adverse inference could be drawn against the appellant as discussed earlier. The relevant portion of 'Ideal Security' (supra) which is germane to this issue and sought to be distinguished by the appellant is reproduced below:

"9. We do agree with the Id. Appellate Authority in the matter of the discrepancy noticed by him in respect of the considerations received and appearing in different manner in two different statutory documents. While the ST 3 return was statutory document under Finance Act, 1994, the balance-sheet and profit and loss account were statutory documents under Companies Act, 1956. Therefore, when the public documents bring the discrepancy, the onus of proof was on the assessee to come out with clean hand to prove its stand."
(emphasis added)

We are in agreement with the legal position stated by the Co-ordinate Bench in 'Ideal Security' (supra) and relied upon by the Original Authority.

7.1.5 Having found that the SCN was issued correctly and not hit by any legal bar, we proceed to examine the other issues involved.

8. The remaining issues stated by the appellant are as under;

- A. It is a settled legal position that treatment in the books of account is not determinative of tax liability.
- B. International inbound roaming Service is not liable to Service tax.
- C. While holding that interconnection usage charges are not taxable prior to 01.06.2007, the impugned Order ought to have set aside the demand of Rs.6,38,210/-on markup outroamer charges which are also in the nature of interconnection usage charges.
- D. Activation deposit cannot be charged to service tax because it is refundable by the Appellant to their post-paid customers (Rs.48,82,163/-).
- E. The impugned Order has accepted that no service tax is payable on interest on delayed payment (Rs.19,86,353/-), and thus, the Appellant is not liable to pay service tax on the same.
- F. The impugned Order merits to be set aside on account of the delay in adjudication of approximately 8 years in adjudication of this matter.
- G. The entire demand is barred by limitation. The extended period of limitation ought not to be invoked as none of the conditions in Proviso of Section 73(1) are invocable in the instant case.
- H. No interest is payable. No penalty is imposable.

We proceed to examine the issues sequentially. We shall also examine the judgements cited by the appellant on the accepted principle that it is neither desirable nor permissible to pick out a word or a sentence from a judgment divorced from the context of the question under consideration and treat it to be complete law. We are in agreement with the appellant's averment in the written submissions that it is settled law that a judgment is a precedent for what is held and not what could be inferred, as at paragraph 11 of **CCE v. Alnoori Tobacco Products** [2004 (170) E.L.T. 135 (S.C.)].

9. **It is a settled legal position that treatment in the books of account is not determinative of tax liability.**

9.1 The appellant states that the demand has been confirmed solely based on the accounting treatment of money. It is submitted that the question of taxability must be decided according to the principles of law and not in accordance with accountancy practice. They have placed reliance in this regard on the following case laws;

- a. ***Tuticorin Alkali Chemicals & Fertilizers Ltd., Madras v. Commissioner of Income Tax, Madras*** [[1997] 227 ITR 172 (SC)].
- b. ***B.S.C. Footwear Ltd. v. Ridgway (Inspector of Taxes)*** [[1972] 83 I.T.R 269].

9.2 We have examined this issue above. Whether the figures shown in the Trial Balance was prepared on accrual basis or on receipt basis, is a question of fact. We have found it was non-disclosure of facts that was within their exclusive knowledge, that has led to an adverse inference and to the issue of the SCN. If it was the appellants apprehension that the question of taxability had not being addressed correctly in the Show Cause Notice, they had an opportunity to put forward the facts and evidences, including the relevant ledger entries, available with them when asked to reconcile data during the dispute resolution process. It would have helped the Original Authority to evaluate whether the accounts were indeed maintained on an accrual basis or on receipts basis. By their failure to give any information on facts which would controvert the allegations in the SCN the inference drawn by the Original Authority in the impugned order cannot be faulted. As stated earlier, the Apex Court in *A. Raghavamma vs A. Chenchamma* (supra) held that adverse inference could be drawn

against the assessee, if he failed to put before the Department material which he was in exclusive possession. While the question of taxability is to be decided according to the principles of law, what was the factual accountancy practice followed must be disclosed with evidence so as to examine the applicability of the principles of law involved to those facts. We do not therefore find any merit in their averments. Hence the decisions cited by the appellant where the accounting facts were disclosed and known are distinguished and are not applicable to this case.

10. International inbound roaming Service is not liable to Service tax.

10.1 The Appellant submits that the quantification of the demand is incorrect as amount charged towards international inbound roaming is not taxable. They however acknowledge that the impugned Order has stated that the international inbound roaming services are not taxable prior to 15.01.2007. We find that the demand in relation to the same happened to be partly confirmed on the ground that the Appellant has not provided the necessary break-up of the amounts in dispute. Further now before us the appellant has taken the view that international inbound roaming services are not liable to service tax at all. As explained by them, an arrangement for international inbound roaming services is executed between a Foreign Telecommunication Operator ("FTO") and the Home Telecommunication Operator ("HTO") whereunder the HTO would provide connectivity services to the subscriber of the FTO for the duration that the inbound roamer is in India. Hence, the Service recipient in this transaction is the FTO and

not the inbound roamer. The Inbound Roamer is merely a beneficiary of the arrangements between the FTO and HTO. Hence, they state, that it becomes important to ascertain the place where the services are rendered to determine if the activity is leviable to service tax. Once the FTO is identified as the service recipient, it becomes evident that the international inbound roaming services are rendered to the FTO outside the territory of India and the transaction becomes an export of services as per Rule 3(iii) of the EoS Rules. We find that the issue as described is a mixed question of fact and law and has not been examined in the impugned order.

10.2 From the impugned order it is seen that the appellant had only taken a stand before the Original Authority that International Inbound roaming services were not taxable prior to 15/01/2007 as per Boards circular No 90/1/2007-ST dated 03/01/2007. They have relied on the following decisions wherein it has been held that international inbound roaming would not be liable to service tax:

- a. **Vodafone Cellular Ltd. v. CCE** [2019 (25) G.S.T.L. 557 (Tri. – Chennai)]. – Notice issued in Revenue Appeal pending in Hon'ble Supreme Court bearing Diary No. 40710/2019 with no interim stay. Difference of opinion in subsequent order in **Vodafone Idea Ltd. v. CCE & ST, Coimbatore Commissionerate** [2022 SCC Online CESTAT 635] and the judgement has been reserved *vide* Order dated 20.04.2023 in ST/41087/2015.
- b. **Vodafone Essar Cellular Limited vs. CCE, Pune** [2013 (31) S.T.R. 738 (Tri. – Mumbai)] – Revenue Appeal to Hon'ble Bombay High Court admitted in Central Excise Appeal Nos. 283 – 286 of 2013 in **Commissioner v. Vodafone Essar Cellular Ltd.** [2016 (41) STR J47 (Bom.)].

- c. **Vodafone Cellular Ltd. v. CCE, Pune-III** [2014 (34) STR 890 (Tri. – Mumbai)] - Appeal to Hon'ble Bombay High Court admitted in Central Excise Appeal 220 of 2014 in **Vodafone Cellular Ltd. v. Commissioner** [2016 (41) STR J113 (Bom.)].
- d. **CST, Mumbai-I v. Vodafone India Ltd.** [2015 (37) STR 286 (Tri. – Mumbai)] – Revenue Appeal to Hon'ble Supreme Court in Civil Appeal Diary No. 38259 of 2014 in **Commissioner v. Vodafone India Ltd.** [2015 (38) STR J431 (SC)].

The Original Authority has agreed that international in-bound roaming subscriber shall not be required to be paid for such service provided during the period from 01/07/2004 to 14/01/2007. Their averment that international inbound roaming services are not liable to service tax at all is a fresh plea. It is seen that the Original Authority has held that the appellant has not furnished the required breakup for the financial year 2004-05 and 2005-06 for the Head 4027 – General Roaming – which includes National and International Inbound Revenue. The appellant has again not refuted the same, except for putting up a legal argument of non-taxability of the service for the period after 14/01/2007 also. What cannot be factually distinguished cannot be legally determined. Their reluctance to disclose factual evidence, which if true, may have given a different perspective to the Original Authority in accordance with their legal view, is perplexing and also fatal to their stand in this era of self-assessment. We have perused the case laws relied upon by the appellant, though interesting, it is difficult to apply in the present context where the appellant has built up his legal arguments without divulging facts in their knowledge even

for delineating the services, as stated by the impugned order and not denied by the appellant. The case laws are hence not applicable to the present set of facts.

11. Out-roamer charges which are also in the nature of interconnection usage charges are not taxable prior to 01.06.2007.

11.1 The appellant has stated that while the impugned Order has dropped the entire demand on interconnection usage charges ("IUC") vide paragraph 5.8.2, the impugned Order has erroneously included an amount pertaining to 'markup out-roamer revenue' home/international, in interconnection usage charges in spite of the data provided by them in the reply to the SCN. Thus, having accepted that the interconnection usage charges is not taxable, the impugned Order ought to have set aside the demand in entirety and the demand of Rs.6,38,210/- also merits to be dropped.

11.2 We have examined the issue and find that the Original Authority has not discussed this matter and has perhaps omitted to consider the same since an explanation of the 'description' of service heads, in the table at para 8.6 of their reply to the SCN, was not provided. A transparent disclosure of their activities when coupled with an exposition of law, would have served their cause well.

12. Activation deposit cannot be charged to service tax because it is refundable by the Appellant to their post-paid customers (Rs.48,82,163/-).

12.1 The Appellant submits that activation deposit is a refundable amount collected from post-paid subscribers as a security deposit at

the time of purchase of SIM cards. It is refunded upon surrender of mobile network connection by the customer, and thus, no service tax liability can be fastened on the Appellant on this amount. They have also relied upon the following case laws that security deposit cannot form part of taxable service provided by the Assessee:

- i. ***Vardhman Developers v. Commissioner, Central Goods & Service Tax*** [(2022) 136 taxmann.com 330 (New Delhi – CESTAT)].
- ii. ***Samir Rajendra Shah v. CCE, Kolhapur*** [2015 (37) STR 154 (Tri. – Mum.)].

12.2 We find that the appellant has made an inference without presenting any fact that the deposits were actually refunded. Merely labelling a payment receipt as 'security deposits' and making inferences about their treatment in law will not suffice. The Apex Court in ***Suresh Budharmal Kalani v. State of Maharashtra*** [(1998 (7) SCC 337)] has held that "A presumption can be drawn only from facts and not from other presumptions by a process of probable and logical reasoning". It is a well-accepted legal proposition that the nomenclature of any activity or document etc, is not decisive of its nature. We find that the appellant has not produced any evidence to show that 'security deposits' were indeed refunded and not retained by them. Further whether they were refunded in full or partially, whether interest was paid to the customers for the deposit etc. They have relied upon the following case laws in support of their view that the activation charges are not consideration for the telecommunication services:

- a. ***Union of India v. Intercontinental Consultants & Technocrats Pvt. Ltd.*** [2018 (10) GSTL 401 (SC)] held that reimbursable expenses would not form part of the

value for levy of service tax because these reimbursements were not charged by the service provider 'for such service'.

- b. **CST v. Bhayana Builders Ltd.** [2018 (10) GSTL 118 (SC)] for the proposition that any amount charged that has no nexus with the service rendered is not exigible to service tax because it is not 'consideration'.

The Apex Court's judgment in **Intercontinental Consultants** (supra) does not come in support of the appellant case since they have not demonstrated that the expenses were reimbursable etc. Secondly both the judgments were rendered in cases where the facts in issue were that amount charged had no nexus with the service rendered. In the present case the impugned order finds that the payment is so integrally connected with the ultimate provision of service, that, but for such payment of the charge provision of service would not have been made by the appellant, hence these service charges collected are part of the activation charges. The appellant, despite ample opportunity, has not pleaded or demonstrated through documents that the service would have been operationalized even if these charges were not paid. Hence the gross consideration that is shown to contribute in rendering the service will form a part of the gross value of the taxable service. In the circumstances reliance placed by the Original Authority on the decision rendered in the case of Idea **Mobile Communication Ltd. v. Commissioner of Central Excise and Customs, Cochin**, [2011 (23) S.T.R. 433 (S.C.)] is justified. As stated by a Coordinate Bench of this Tribunal in the case of **CCE, Chandigarh v. TEAM S & S.** [2011 (21) S.T.R. 290 (Tri. - Del.)]

“5. The basic principle that Service tax being destination based consumption tax, till the service reaches its destination, that contributes to the proposition that all expenses incurred till that point and time become essential consideration of cost of service. Agreement of parties in respect of modality of payment of valuable consideration towards service provided does not matter for Revenue. In whatever manner the recipient and provider of taxable service arrange their affairs for their benefit or mutuality to deal with consideration that is also immaterial to Revenue. Service Valuation Rule of 1994 contributes to the above fiscal philosophy and the destination based consumption tax submit for taxation on the gross value of taxable service which is measure of taxation. The gross value takes into its fold entire cost of service enabling that to be performable. Therefore, by no stretch of imagination neither the arrangements of the parties nor their mutuality or nomenclature or format of their agreement and mode of discharge of consideration shall prevail on the law relating to service tax. Legislature accordingly intend that the gross value of the service shall be the measure of value for taxation whether paid as consideration directly or by reimbursement of expenses relating to providing of taxable service.”
(emphasis added)

We that the same applies to this case as well.

13. The impugned Order has accepted that no service tax is payable on interest on delayed payment (Rs.19,86,353/-), and thus, the Appellant is not liable to pay service tax on the same.

13.1 The appellant states that the impugned Order has clearly held at paragraph 5.8.7 that the interest on delayed payment is not taxable by relying on **Circular No. 32/3/2000-CX dated 20.12.2000** and further reiterated by **master Circular No. 96/7/2007-ST dated 23.08.2007**. Having accepted that interest on delayed payment is not taxable, the impugned Order incorrectly confirmed the demand, contrary to its own conclusions.

13.2 We find that the Original Authority has advanced the following reason for confirming the demand. The relevant portion of para 5.8.7 of the OIO is reproduced below:-

“On perusal of the list of ‘services and charges accounted/charged on Post paid and Pre-paid service’, furnished by the assessee, I find that the ‘Trial Balance head - Interest on delayed payment’ is listed under ‘Other miscellaneous charges’. Also on perusal of the invoices

furnished by the assessee, I find that 'Misc Credits / Charges' are included for computing the taxable value and service tax is charged on the same from the subscriber. The assessee has not produced any documentary evidence to prove that interest on delayed payment are not included for computing the service tax liability. Therefore, I conclude that service tax collected on the interest charges on delayed payment would form part of taxable value for the purpose of calculating service tax liability'.

(emphasis added)

As per Section 73A(2) of the Finance Act, 1994 monies collected as a tax, even if wrongly done, has to be deposited to Government. We find that once again while the appellant is strong on making inferences and assertions, they were weak on submitting factual replies resulting in a decision that is adverse to them, based on charges that are uncontroverted factually.

14. The impugned Order merits to be set aside on account of the delay in adjudication of approximately 8 years.

14.1 The appellant has placed reliance on the following cases where proceedings were quashed on account of inordinate delay in adjudication:

- a) ***Yangir Properties & Trading Ltd. v. Union of India*** [2021 (376) ELT 403 (Guj.)] – Notice issued in ***Union of India v. Yangir Properties & Trading Ltd.*** [2021 (378) ELT A20 (SC)].
- b) ***Siddhi Vinayak Syntex Pvt. Ltd. v. Union of India*** [2017 (372) ELT 455 (Guj.)] – Appeal disposed on account of monetary limit not being adhered to in ***Union of India v. Siddhi Vinayak Syntex Pvt. Ltd.*** [2022 (379) ELT 553 (SC)].
- c) ***Steel Authority of India Ltd. v. Office of Asst. Comm. of GST & CE and Ors.*** [Final Common Order dated 25.11.2022 in WP Nos. 17201, 17202, 17204, 17205, 17208, 17210 of 2020] – Department has gone on appeal against this decision in WA Nos.1369, 1371, 1373, 1377, 1379, and 1380 of 2023 with no interim stay.

d) ***Meghmani Organics Ltd. v. Union of India*** [2019 (368) ELT 433 (Guj.)]. ***Kamdhenu Exim Pvt. Ltd. v. Union of India*** [2019 (368) ELT 303 (Guj.)].

We find that the appellant has not disclosed any facts on which the inference was made by them. It is not disclosed whether the delay, if any, was on the part of the Adjudicating Authority or caused by the appellant themselves. This is even more relevant as it was pointed out in the impugned order that the appellant was not diligent in responding to the queries of the Department in reconciling the Trial Balance with the ST 3 Return. Further whether there was any legal requirement not to adjudicate the matter during a particular period etc. has not been disclosed. They have also not referred to any provision in the Act that permits statutory authorities to set aside the impugned order based on delay, if any. Those who assert must prove. On these grounds we feel that the facts in the case cited by the appellant and those in the present issue are distinguished. Legal precedents can be on a question of law and not on the question of determining facts. The judgements of Constitutional Courts cited by the appellant above are based on the peculiar facts of delay in those cases which are discussed elaborately therein before arriving at a decision. They are not directly comparable and are distinguishable. Further, powers of Tribunals are not concomitant with that of Constitutional Courts. Hence, we are not inclined to accept this submission made by the appellant. The Appellant submits that in ***Puneet Steels & Alloys Pvt. Ltd.*** [2017 (358) ELT 1253 (Tri. Del.)] the Order of the lower authority had been set aside by the Hon'ble CESTAT on account of an unexplained delay in adjudication of 9 years. We find that the order does not disclose the

precise provision in law which permits statutory authorities to set aside the impugned order based on delay, if any. In fact, the Act at the relevant time did not provide any period within which the adjudication proceedings should be completed. The Hon'ble Supreme Court had an occasion to examine a similar action taken by the Tribunal in **Collector of Central Excise Vs Bhagsons Paint Industry (India)** [2003 (158) E.L.T. 129 (S.C.)]. The Court held:

Order]. - The Tribunal in an appeal arising under the Central Excise Act held that the adjudication made after a lapse of nearly nine years after the issue of show cause notice is not permissible and set aside the same.

2. There is no statutory bar to adjudicate the matter even after lapse of nine years after the issue of show cause notice and the adjudication pertains only to the actual levy of the duty which is due to the department and not to any levy of interest or penalty. In these circumstances we think the view taken by the Tribunal is not justified and we set aside the order made by the Tribunal and remit the matter to the Tribunal for fresh disposal in accordance with law after restoration of the appeal to its original number. The appeal is allowed accordingly.

The issues as stated in the judgement above find resonance in this case. Hence the precedential value of the cited Tribunal judgment is of a limited nature.

15. The following issues raised by the appellant remain to be examined.

(A) The entire demand is barred by limitation. The extended period of limitation ought not to be invoked as none of the conditions in Proviso of Section 73(1) are invocable in the instant case.

(B) No interest is payable. No penalty is imposable.

We feel that the cause of substantial justice must be met and the issues as listed at points B, C, D, E, G and H of para 7.1.5 above be examined, with all contentions therein being left open, so that the appellant is not

deprived of putting forward any factual evidence that they have, to enable a fair and just decision being taken. Hence we do not examine the issues stated above at this stage.

16. Having regard to the discussions above we remand the matter back to the Original Authority for de novo adjudication. The lower authority shall follow the principles of natural justice and afford a reasonable and time bound opportunity to the appellant to state their case both orally and in writing if they so wish, before issuing a speaking order in the matter. The appellant should also co-operate with the adjudicating authority in completing the process expeditiously and in any case within ninety days of receipt of this order. The appeal is disposed of accordingly.

(Pronounced in open court on 25.08.2023)

(M. AJIT KUMAR)
Member (Technical)

(P. DINESHA)
Member (Judicial)

Rex