CUSTOMS, EXCISE AND SERVICE TAXAPPELLATE TRIBUNAL, CHENNAI

REGIONAL BENCH – COURT NO. IV

Service Tax Appeal No.42786 of 2014

(Arising out of Order-in-Appeal No.100/2014 dated 16.09.2014 passed by the Commissioner of Central Excise (Appeals), Madurai)

Sun Marketing
No.202, West Car Street,
Near Police Station Road,Sivagangai 630 561 **: Appellant**

VERSUS

Commissioner of Central Excise,
Central Revenue Building,
No.4, Lal Bahadhur Shastri Road,
Bibikulam, Madurai 625 002. **: Respondent**

WITH

Service Tax Appeal No.41426 of 2015

(Arising out of Order-in-Appeal No.027/2015 dated08.04.2015 passed by the Commissioner of Central Excise (Appeals-I), Coimbatore)

Prabhakaran Electronics,
No.94-I, Suriya Complex,
Agraharam Street,Virudhunagar. **: Appellant**

VERSUS

Commissioner of Central Excise,
Central Revenue Building,
No.4, Lal Bahadhur Shastri Road,
Bibikulam, Madurai 625 002. **: Respondent**

AND

Service Tax Appeal No.40756 of 2016

(Arising out of Order-in-Appeal No.04/2016 dated 25.01.2016 passed by the Commissioner of Central Excise (Appeals), Madurai)

MCC TV
No.7A, K.R. Pushpam Complex,
Aarathy Theatre Road,Dindigul – 624 001 **: Appellant**

VERSUS

Commissioner of Central Excise
Central Revenue Building
No.4, Lal Bahadhur Shastri Road
Bibikulam, Madurai 625 002 **: Respondent**

APPEARANCE:

Shri M.N. Bharathi,Advocate for the Appellant

Shri L. Nandakuma, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI CJ MATHEW, MEMBER (TECHNICAL)
HON'BLE SHRIP DINESHA, MEMBER (JUDICIAL)

FINAL ORDER NOs.41753-41755/2019

DATE OF HEARING: 12/12/2019

DATE OF DECISION: 12/12/2019

Per: CJ Mathew

It would appear from the facts in the appeal of M/s Sun Marketing, challenging order-in-appeal no.150/2014 dated 16th September 2014 of

Commissioner of Central Excise (Appeals), Maduraiupholding of the order of the original authority confirming duty liability of ₹9,71,861/- as tax not paid for the period from 2007-08 to 2011-12 along with other detriments, that the proceedings were initiated on the main activity of the appellant, *viz.,* commission earned on 'purchase of DTH boxes', 'monthly subscription/renewal cards','electronic subscription/renewal cards' and the fee collected for installation of 'set top boxes' at the premises of the consumer. Appellant is an interface of 'broadcasting agency' with customers and enables the latter to receive 'signals' broadcasted by the former. It would also appear from the records and the findings of the lower authorities that the appellant had been operating from December2007 to July2011 and had been discharging tax liability as provider of 'business auxiliary services' taxable under section 65(105)(zzb) of Finance Act, 1994 on the 'installation fee' collected by them. It further appears from the records that the entire fees earned as commission on sale of the equipment/cards obtained at a discount and the installation fee were reflected in the final accounts as well as in the income-tax returns filed by them. As the appellant had not been filing income-tax returns after 2008-09, the 26AS statements for the period thereafter till 2011-12 was relied upon as source of this information. Controverting the claim of the appellant that tax was required to be discharged only on the installation fee, the total liability was worked out on the two components and, after adjusting for the taxes already paid, the remaining amount was sought to be recovered as provider of 'business auxiliary service' during the disputed period. Aggrieved by the finding, the appellant is before us.

2. We have heard Learned Counsel for the appellant and the Learned Authorized Representative at length. Learned Counsel for the appellant has placed reliance upon the decision of the Tribunal in *Goyal Automobiles v. Commissioner of Central Excise, Chandigarh-II[2016 (43) STR268 (Tri-Del)]* and in *Kumar"s Electronics v. Commissioner of Central Excise, Madurai [2019 (29) GSTL463 (Tri-Chennai)]*.

3. In *re Goyal Automobiles*, it has been held that

„6. We note that the impugned order has built its foundation on the assumption that appellants render "business auxiliary service" in relation to SIM cards and hence liable to tax on the commission earned by them. At the same time, the impugned order has considered the commission received as discount on sale of recharge and "top-up" coupons as not liable to tax following the decision of the Tribunal in Commissioner of Central Excise, Meerut v. Moradabad Gas Service [2013 (31) STR 308 (Tri.-Del.)]. Our attention has also been drawn to the decisions of this Tribunal in the case of GR Movers v. Commissioner of Central Excise, Lucknow [2013 (30) STR 634 (Tri.-Del.)] and Daya Shankar Kailash Chand v. Commissioner of Central Excise & Service Tax, Lucknow [2013 (30) STR 428 (Tri.-Del.)]. The Hon"ble High Court of Allahabad has upheld these two decisions.

7. We find that this contrived distinction attempted in the impugned order by the first appellate authority does not conform to logic or to any commercial distinction. On the contrary, the three decisions cited above are clear in laying down the principle that the user of the telephony services is the service recipient and tax liability on the gross value charged from such customer, whether first-time purchaser of SIM card or subsequent purchaser of other cards, is collected from the customer and deposited to Government account by the principal. An attempt has been made to catalogue the various activities that devolve on the appellants in relation to activation of SIM cards without appreciating the fact that the SIM cards are marked with an MRP on *which tax is collected in full from the customer. Therefore, the commission paid to appellants is also included in the value on which tax has been collected from the customer. The customer is, consequently, the recipient of the full value of services from none other than M/s. Bharat Sanchar Nigam Ltd.; thus, it is no different from the other two products.*

8. The rationale for non-leviability of tax in relation to recharge and „top-up" coupons in Paragraph 26 in re GR Movers (supra) is as follows :

> *"26. Though the correct procedure for discharge of the service tax liability by the two parties is that the distributors raise bills for commissions that is due to them along with service tax and BSNL takes Cenvat credit of tax paid by distributors for discharging liability on the telecommunication service provided by BSNL, such procedure dos (sic) not result in extra realization of Revenue. Considering the special nature of the impugned activities and the fact that it can be easily verified that full taxable value of the service provided by BSNL to customers is subjected to tax, we are of the view that there is no case to undo decisions already taken by the Tribunal in this regard. A contrary approach will result in a difference in value that is taxed for mobile telecom service according to the decision of the Apex Court in the case of Commissioner v. BPL Mobile Cellular Ltd. - 2011 (24) STR J175 (SC). We also note that this issue has lost relevance for the future because of exemption under Notification 25/2012-S.T.-S. No. 29 for this type of service.""*

while in *re Kumar"s Electronics*, it has been held that

„7. The first contention of the Ld. DR is that the judgments relied upon by the Ld. Counsel for the appellant pertain to BSNL or other telecom SIM cards and not to recharge coupon vouchers of DTH operators. We are unable to agree with this argument because the logic, on which it was held that no service tax needs to be paid on the commission of the commission agent, is the same in

> *both the cases. Once the service tax has been paid on the M.R.P. no service tax needs to be paid on the commission received by the distributor because it is a part of the M.R.P. If tax is so levied, it amounts to double taxation. This view held by the Tribunal has been upheld by the Hon"ble High Court of Allahabad and subsequently followed by the Hon"ble High Court of Madras. The present case, though it pertains to DTH operators, stands on the same footing and the logic, in our opinion, should be applied to these cases as well. It is true that the appellant is providing services to the DTH operators and is getting commission for such services. If the appellant had paid service tax on such commission, the main DTH operator could have availed Cenvat credit of the same thereby proportionately reducing the amount paid in cash by the DTH operator. Therefore the entire exercise is also revenue-neutral. In view of the above, we find that the issue is no longer res integra. On the SIM cards, recharge coupons etc., where the service tax has been paid on the M.R.P. by the main operator the commission agent/distributor need not pay service tax on the commission received by him because commission also forms part of the M.R.P. on which service tax has already been discharged."*

4. As both these decisions have followed the decision of the Tribunal in *GR Moversv Commissioner of Central Excise, Lucknow[2013 (13) STR634 (Tri-Del)]*that has been upheld by the Hon'ble High Court of Allahabad, we see no reason to accept the contrary

stand adopted by the tax authorities. Accordingly, we set aside the impugned order and allow the appeal.

(Pronounced in the open court)

(P DINESHA)
MEMBER (JUDICIAL)

(CJ MATHEW)
MEMBER (TECHNICAL)

ksr

	DRAFT			Remarks
	I	II	III	
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