

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH – COURT NO. I

Service Tax Appeal No. 53553 of 2015

(Arising out of Order-in-Original No. ALW-EXCUS-OIO-COM-10-1516 dated 22.07.2015 passed by the Principal Commissioner, Central Excise, Alwar)

M/s J.K. Enterprises
Choburja Bazar,
Bharatpur (Rajasthan)

Appellant

VERSUS

**Principal Commissioner, Central Excise
Commissionerate, Alwar**

Respondent

Appearance

Ms. Surabhi Sinha, Advocate – for the Appellant.

Shri Rajeev Kapoor, Authorized Representative – for the Respondent.

CORAM : **HON'BLE MR JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 22/12/2022
DATE OF DECISION : 19/01/2023

Final Order No. 50049/2023

P.V. Subba Rao

M/s J.K. Enterprises¹ filed this appeal to assail the order in original dated 22.07.2015 passed by the Principal Commissioner of Central Excise, Alwar whereby he confirmed the demand of Rs. 62,20,384/- as service tax under Section 73 and imposed and an equal amount of penalty under Section 78 and further imposed a penalty under Section 77.

¹ appellant

2. The appellant buys and sells SIM cards, recharge coupons etc. for mobile phones under a super distributor agreement with M/s Vodaphone Essar Digilink Ltd. A show cause notice dated 11.10.2013 covering the period April 2008 to March 2012 was issued to the appellant alleging that it was providing business auxiliary service to M/s Vodaphone Essar Digilink Ltd. as their franchisee for sale/distribution and marketing of the SIM cards and recharge coupons. Accordingly, service tax was demanded and penalties were proposed to be imposed. The show cause notice culminated into the issue of the impugned order.

3. Learned counsel for the appellant made the following submissions:

- (i) The entire demand is hit by limitation as it has been issued after a period of one year and extended period of limitation could not have been invoked in this case because on the same issue a show cause notice dated 26.04.2011 was issued to the appellant by the Department. The second show cause notice cannot be issued invoking extended period of limitation. Reliance was placed on **Nizam Sugar Factory Vs. Collector of Central Excise²**;
- (ii) Invocation of extended period of limitation is also not sustainable because there were divergent views on the issue at that time and the appellant was under the bona fide belief that it was not liable to pay service tax on the sale or purchase of the SIM cards;

² 2006 (197) ELT 465 (SC)

(iii) The sale and purchase of SIM cards is trade and not a service and, therefore, it does not amount to providing business auxiliary service to M/s Vodafone as has been held in the following cases:

- (i) **Virmati Software And Telecommunications Ltd. Vs. Commissioner of Central Excise & Service Tax, Ahmedabad;**³
- (ii) **Devangi Communication & Other Vs. CST & CE, Bangalore-ii and CCE Vs. Shri V.M. Nayak Benne**⁴
- (iii) **M/s Deccan Associated Vs. CCE & ST, Calicut**⁵;
- (iv) **M/s Jalaram Agency Vs. CST-Mum-II**⁶;
- (v) **M/s ASS Manoharan Vs. CEX, Tiruvelveli & Ors.**⁷;
- (vi) **CCE, Lucknow Vs. M/s Chotey Lal Radhey Sham**⁸

(iv) Even if the demand is upheld, penalties cannot be imposed and the benefit of Section 80 of the Finance Act 1994 may be extended to set aside the penalties.

4. Learned authorized representative for the Revenue supports the impugned order. He submits that SIM cards are not goods but are a form of a service as held by the Supreme Court in **Idea Mobile Communication Ltd.**⁹. Therefore, the adjudicating authority has correctly held that the appellant was providing business auxiliary service to its principal M/s Vodafone.

5. We have gone through the records of the case and considered the submissions on both sides.

3 2021 (52) GSTL 622 (Tri.-Ahmd.)

4 2018 (8) TMI 960;

5 2018 (6) TMI 1153

6 2017 (9) TMI 938

7 2017 (8) TMI 221

8 2017 (9) TMI 509.

9 [2011 (23) STR 433 (SC)]

6. It is undisputed that the appellant was buying and selling of SIM cards and recharge coupons for M/s Vodafone. The question which arises is if the sale and purchase of SIM cards of M/s Vodafone amounts to providing a service to M/s Vodafone or is it simply trading of SIM cards and recharge coupons. If it amounts to providing a service to M/s Vodafone the question is whether such service falls under "business auxiliary service" and is exigible to service tax or otherwise. A related question is whether extended period of limitation has been correctly invoked in the show cause when on an identical issue a show cause notice was earlier issued to the appellant by the Department.

7. We proceed to deal with the question of extended period of limitation first. As per Section 73 of the Finance Act, 1994 demand invoking the extended period of limitation can be issued where service tax was not paid by reason of (a) fraud or (b) collusion (c) wilful mis-statement (d) suppression of facts or (e) violation of act or rules with an intent to evade payment of duty. It is a well settled legal principle that "suppression" does not mean mere omission but a positive act of suppressing information with an intent to evade payment of service tax. It is undisputed that in this case, the Department was fully aware of the activities of the appellant and had issued a show cause notice on 26.04.2011. Therefore, the Department cannot allege that it was not aware of the activities of the appellant and that the appellant had suppressed any information. The entire demand in this case is beyond the normal period of limitation. We agree with the learned counsel that the decision of **Nizam Sugar Factory** applies squarely

to this case and a second show cause notice could not have been issued invoking extended period of limitation. On this ground alone the entire show cause notice needs to be set aside.

8. Coming to the merits of the case, according to the appellant it is trading in SIM cards and recharge coupons and, is not rendering any service to the principal. It is buying the SIM cards from it and selling them to others. Such arrangements are made by various telecom operators whereby they appoint distributors to buy and sell their SIM cards. The case of the Revenue is that since the Supreme Court has held in the case of Idea Cellular, that SIM card is not goods and its value is includible to the value of the service provided by the telecom operator, buying and selling of SIM cards can be considered as rendering business auxiliary service to the principal. We find that this Tribunal has consistently held that buying and selling of SIM cards and recharge coupons does not amount to providing business auxiliary service to the principal in several cases. In the case of **M/s Devangi Communications & Others**, this issue was discussed and it was held as follows:

"5. We find that the instant case is squarely covered by various case laws cited by the appellants. We find that CESTAT has continuously held that telecom operators discharging service tax on the whole MRP value of SIM cards and recharge cards there could be no further service tax liability on the persons who are dealing/selling the said SIM cards or recharge cards to the public. The ratio adopted was also upheld by Hon'ble Supreme Court in 2015 (37) STR J132 as well as by Hon'ble Madras High Court in Bharti Televentures Ltd.: 2015 (40) STR 221 (Mad.). Coming to the contention of the learned DR that there is a specific contract between BSNL and the appellants, we find that similar is the issue with all the service providers like BSNL and other operators and the respective dealers as has been elaborately discussed in Tribunal's Delhi order CCE Vs. Moradabad Gas Services: 2013 (31) STR 308 (Tri.-Del.)

5.1 We also find that when the appellants have received incentives and discounts in the course of their trading activity, they are not liable to pay service tax as per the ratio of the following decisions:

Kerala Publicity Bureau Vs. CCE: 2008 (9) STR 101 (Tri.-Bang.)

Euro RSCG Advertising Ltd. Vs. CCE: 2007 (7) STR 277 (Tri.-Bang.)

P. Gautam & Co. Vs. CST: 2011 (24) STR 447 (Tri.-Ahmd.)

Mccann Erickson (India) Pvt. Ltd. Vs. CST: 2008 (10) STR 365 (Tri.-Del.)

CST vs. Jaybharat Automobiles Ltd.: 2016 (41) STR 311 (Tri.-Mum.)

My Car Pvt. Ltd. vs. CCE: 2015 (40) STR 1018 (Tri.-Del.)

CST vs. Sai Services Station Ltd.: 2014 (35) STR 625 (Tri.-Mum)

5.2 In view of the discussions above, appeals filed by the appellants survives and the appeal filed by the Revenue needs to be set aside.

6. In view of the above, appeal No. ST/21546/2015 filed by the Revenue is rejected and all other appeals are allowed."

9. We further find the issue was decided by High Court of Allahabad in the case of **Commissioner, Central Excise Vs. M/s Chotey Lal Radhey Shyam**. The questions raised by the High Court and the answer are as follows:

"On 20th April, 2016, appeal was admitted on following substantial questions of law:-

- (i) Whether the Hon'ble CESTAT has erred in not confirming the demand of Service Tax along with interest and imposition of penalties (as confirmed in the Order in Original dated 3.10.2010) for the period in question when the "Business Auxiliary Service" was clearly defined under Section 65(19) of the Finance Act, 1994 and included services rendered by the Respondent?
- (ii) When the Hon'ble Apex Court in the case of Idea Mobile Communication reported in 2011 (23) STR 433 (SC) has held that the value of SIM card forms part of activation charges as no activation is possible without valid functioning of SIM card and the value of taxable service is calculated on the gross total amount and the present transactions to BSNL and payment by BSNL were different, whether the Hon'ble CESTAT was justified in dropping the demand?
- (iii) Whether the Hon'ble CESTAT erred in treating it as double taxation when Services are distinct? Service

Tax is paid on the full value of SIM card by BSNL under the "Telecommunication Service" and not under "Business Auxiliary Service". In the instant case Service Tax has been demanded from the respondent under the category of "Business Auxiliary Service" on the commission received from BSNL, which is different from "Telecom Service."

- (iv) Whether the Hon'ble CESTAT was justified in rejecting the plea of the Department when the Hon'ble CESTAT itself has given detailed reasons for the same vide paragraph 18 to 21 of the final order No. ST/A/684-687/2012 dated 06.11.2012 in case of M/s Martend Food & Dehydrates Pvt. Ltd. which was relied upon in this case holding that "The argument that tax should not be demanded in situation where somebody else has paid tax on the taxable value of a service is not an argument that can be accepted normally" and has itself referred to Board's Circulars?

6. Judgment of Supreme Court in Idea Mobile Communication Ltd. [2011 (23) STR 433 (SC)] (supra) has been considered by Tribunal, Principal Bench, New Delhi and similar issue has already been considered in aforesaid judgment of this Court, with which we do not find any reason to take a different view. Hence, aforesaid questions are answered against Revenue, following aforesaid judgments."

10. In view of the above, we find that the impugned order cannot be sustained either on merits or on the limitation. The impugned order is set aside and the appeal is allowed with consequential relief to the appellant.

(Pronounced in open Court on 19/01/2023)

(Justice Dilip Gupta)
President

(P.V. Subba Rao)
Member (Technical)

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