CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. 1

Service Tax Appeal No. 53575 of 2014

[Arising out of Order-in-Original No. DEL-SVTAX-ADJ-COM-40-43/2014 dated 26.02.2014 passed by the Commissioner, Service Tax Commissionerate, New Delhi]

Commissioner of Service Tax, New Delhi **Appellant**
17-B IAEA House, I P Estate, New Delhi

Versus

M/s TV Today Network Private Limited **Respondent**
Videocon Tower, E-1,
Jhandewalan Extension
New Delhi
Corporate Office: India Today Group
Mediaplex, FC-8, Sector-16A, Filmcity, Noida

Appearance

Present for the Appellant : Shri R K Manjhi, Authorised Representative

Present for the Respondent: Shri B L Narasihman
and Shri Narender Singhvi, Advocates

With
Service Tax Appeal No. 54202 of 2014

[Arising out of Order-in-Original No. 40-43/ST/SRB/2014 dated 26.02.2014 passed by the Commissioner, Service Tax Commissionerate, New Delhi]

M/s TV Today Network Private Limited **Appellant**
India Today Group
Mediaplex, FC-8, Sector-16A, Filmcity, Noida

Versus

Commissioner of Service Tax, New Delhi **Respondent**
17-B, IAEA House, I P Estate, (Near WHO
Building) New Delhi

Appearance

Present for the Appellant : Shri B L Narasihman
and Shri Narender Singhvi, Advocates

Present for the Respondent: Shri R K Manjhi, Authorised Representative

CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing/Decision: 23/08/2019

FINAL ORDER NOs. 51780-51781/2019

BIJAY KUMAR:

1. M/s Tv today Network has filed Service Tax Appeal No. 54202 of 2014 against the Order-in-Original No. 40-43/ST/SRB/2014 dated 26/02/2014 passed by the Commissioner of Service Tax, Adjudication, New Delhi by which a demand of Rs. 3,07,02,997/- has been confirmed against M/s TV Today Network Pvt. Ltd. (hereinafter referred to as 'the Appellant') under ' Business Support Service' (in short 'BSS') for the period from 01.05.2006 t0 31.03.2012 and under 'Information Technology Service' for the period from 16.05.2008 to 31.03.2009 under Section 65 of the Finance Act 1994 (for short the Act). The individual amount of demand confirmed against the Business Support Service is of Rs. 3,04,92,400/- and for Information Technology Software Services is of Rs. 2,10,537/- .

2. The Department has also filed Service Tax Appeal No. 53575 of 2014 against the same impugned order by which the Adjudicating Authority has dropped the demand pertaining the import of services from M/s Echostar Satellite and Broadcasting Services. As both the appeals emanate out of a common order, the two appeals are taken up together for disposal.

3. The Appellant is engaged in broadcasting of various channels such as Aaj Tak, Headline Today, Dilli Aaj Tak, and Tez and is registered with the Service Tax Department for rendering taxable services, namely, Broadcasting Services, Online Information and Data Based Access and Retrieval Services, Management, Maintenance and Repair Services (in short

MMR) etc. During the course of audit of the record of the Appellant by the department, certain discrepancies were noticed, which led to the issuance of four Show Cause Notices the details of which are reproduced as under;

S No.	SCN dated	Relevant Period	
		BSS	**ITSS**
1	19.10.2010	01.05.2006 to 30.09.2009	16.05.2008 to 31.03.2009
2	15.03.2011	01.10.2009 to 31.08.2010	NA
3	24.04.2012	01.09.2010 to 31.03.2011	NA
4	05.09.2012	01.04.2011 to 31.03.2012	NA

4. The demand was raised for non-payment of service tax on service imported under the category of Broadcasting Services as per contract dated 29.06.2005 between the Appellant and M/s Echostar Satellites , LLCUSA (hereinafter referred to as the 'Echostar') . It has been observed that the transmission services rendered by the Echostar appeared to have been imported by the Appellant to open their TV channels in foreign territory. This service was proposed to be covered under the taxable category of Broadcasting Services as defined under Section 65(105)(zk) of the Finance Act, 1994. The Appellant, being a recipient of such services, it appeared to be liable to pay service tax on the amount paid to the service providers having fixed establishment outside India against the services of broadcasting services received in terms of provisions of Rule 2(1)(d)(IV) of Service Tax Rules, 1994 (for short 'the Service Tax Rules'). The other demand as per show cause notice was on account of non-payment of service tax on import of services from M/s Intelsat Corporation (for short 'Intelsat') falling under the category of 'Business Support Services' classifiable under Section 65 (105) (zzq) of the Act as taxable service. The service tax was demanded under the provisions of Rule 2(1)(d)(IV) of Service Tax Rules read with Section 66A of the Finance Act as amended. The other category

of demand in the show cause notices pertained to import of service from M/s Aveco and M/s Octopus, under Management, Maintenance or Repair Services. As far as the demand under the first category of service is concerned, the same was dropped by the adjudicating authority, which is subject matter of the appeal filed by the Revenue. The demand on the second issue was confirmed under 'BSS' and pertaining to third issue under MMR was dropped for the period prior to 16.05.2008 and was confirmed for the period from 16.05.2008, under the category of 'Information Technology Software Services'. Being aggrieved the Appellant and Revenue are in appeals before this Tribunal.

5. Learned Advocate on behalf of Appellant submits as under;

(i) The impugned order has confirmed the demand of service tax on the Appellant under 'reverse charge' on payment made by it to Intelsat under the category of BSS, which is not liable for payment of service tax. The Appellant is a broadcaster and has hired transponder capacity on the satellites owned by Intelsat. Intelsat is a company specialised in satellite operation and the said capacity was used by the Appellant for uplinking and downlinking of signals to provide broadcasting services. It has also been submitted that the taxable services of 'BSS' covers the activities specified under Section 65(104c) of the Act. Learned Advocate submitted that the services rendered by the Appellant is beyond the ambit of 'BSS' and for which he has place reliance on the Circular of CBEC dated 28.02.2006, which clarified introduction of BSS to all such outsourced services. The Appellant is not engaged in such activities so as to come within the purview of BSS. Reliance has been also placed on the decision of this Tribunal in **Commissioner vs. R D Kute & Company [2017-TIOL-1131-CESTAT-MUM],** wherein it was held as under;

> "6. We also take note that the definition of the taxable service in Section 65(104c) of Finance Act, 1994 broadly includes all activities that are, in the normal course of business, matters of internal processes of an entity. These relate primarily to the various functional aspects of the working of an organisation such as production management, sales management, financial management and marketing management and that, when these essential work of an organisation is outsourced, the provider of outsources service is liable to be taxed."

(ii) Reliance has also been placed on the following decisions;

- **HAL Offshore Limited vs. Commissioner, [2018-TIOL-1631-CESTAT-DEL]**
- **BSNL vs. Commissioner, [2017-TIOL-2420-CESTAT-DEL]**
- **Paradise Investments vs. Commissioner [2017-TIOL-1842-CESTAT-DEL]**
- **Madras Race Club vs. Commissioner [2018-TIOL-2296-CESTAT-MAD]**

(iii) It is the submission of learned Advocate that the Appellant is not engaged in rendering any outsourced activity so as to come under the scope of 'BSS'.

(iv) It has further been submitted that the definition of BSS being inclusive definition, the scope thereof is limited to item mentioned therein only. The case of the Department case is that Intelsat is providing infrastructural support to the Appellant, but the same is clarified in Explanation to Section 65(104c) in an inclusive manner as to provide office utility, lunch, reception, with competent person to handle messages, secretarial services, internet and telecom facilities, pantry and security. The Explanation cannot be extended to activity of hiring transponder.

(v) It has, however, been submitted that the subject activity cannot be charged to service tax being in nature of deemed sale placing reliance on the decision of Karnataka High Court in **Antrix Corporation Limited vs. Assistant Commissioner, 2010 (29) VST 308 (Karn.),** wherein it has been held that providing space segment capacity i.e. transponder capacity is in the nature of right to use the goods taxable under Karnataka VAT Act, 2003. Reliance has also been placed on the decision of this Tribunal in **Helgo Charters Private Limited vs. Commissioner. 2017-TIOL-2831-CESTAT-MUM**.

(vi) Learned Advocate also submitted that activities conducted by the Appellant is not BSS but covered under Section 65(16) and thus cannot be covered under the category of 'BSS' by applying the principle of Section 65A of the Finance Act. Hence, the confirmation of demand under the category of 'BSS' is not sustainable and deserves to be set aside.

(vii) Learned Advocate also submitted that the confirmation of demand of service tax under Information Technology Support Services (in short ITSS) is not sustainable and has rightly been set aside in the impugned order as the said demand pertains to services received by the Appellant from abroad for repair of information technology software. Such services of maintenance of Information Technology Software Service has been made taxable with effect from 16.05.2008 by way of insertion of Clause (b) to the definition of Management, Maintenance and Repair Services under Section 65 (64) of the Act and so the said service cannot be taxed under the category of any service including ITSS. Reliance has been placed on the decision of this Tribunal in **SAP India Private Limited vs. Commissioner [2011 (21) STR 303 (Tri.-Bang.)]**. It is for this reason that the same has been dropped prior to 16.05.2008. However, the confirmation of demand for the period from 16.05.2008 under the category of 'ITSS' cannot be sustained as the same is beyond the scope of show cause notice as the demand has been proposed under MMR.

(viii) Learned Advocate also submitted that the extended period of limitation cannot be invoked in this case as the Appellant has not suppressed any fact with intent to evade the payment of service tax. The Appellant was under a *bonafide* belief that it was not liable to pay service tax. The show cause notice fails to indicate any positive act of suppression on the part of the Appellant and the invocation of extended period has been found to be merely on the ground of non payment of tax.

(ix) It has also been submitted that even if service tax is required to be paid by the Appellant under the reverse charge on the said services, the same will be available as cenvat credit to the Appellant as the said services are used under the provisions of output services and, therefore, would result into a revenue neutral situation. In this regard, reliance has been placed on the following decisions;

- **Jay Yuhshin Limited vs. Commissioner [2000(119)ELT 718 (Tri.-LB)]**
- **Commissioner vs. Narmada Chematur Pharmaceuticals Limited vs. 2005 (179)ELT 276 (SC)]**
- **Jet Airways (I) Limited vs. Commissioner [2016 (44) STR 465 (Tri.-Mum)]**
- **Commissioner vs. Mahindra Water Utilities Limited [2017-TIOL-3846-CESTAT-MUM]**
- **Rochem Separation Systems (India) P Limited vs. Commissioner, 2015 (39) STR 112 (Tri.-Mum)].**

(x) Learned Advocate further submitted that there was a confusion regarding the imposition of service tax under the reverse charge and as such the demand beyond the normal period would be time barred. Learned Counsel also submitted that penalty should not be imposed and placing reliance has been placed on Section 80 of the Finance Act.

6. Learned Authorised Representative on behalf of Revenue, however, supported the impugned order and reiterated the findings contained in the impugned order.

7. We have considered the rival submissions and have perused the records.

8. First of all we take the demand confirmed on the payment made to Intelsat under 'BSS'. It is defined under Section 65 (104c); which reads as under;

> **"65 (104c): Support Services of Business or Commerce"** means services provided in relation to business or commerce

> and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational assistance for marketing, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.
>
> **Explanation** -For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security";

9. The taxable service is defined under Section 65 (105)(zzq) which is as under;

> **"Section 65 (105)(zzzq): "Taxable Service"** means any service provided or to be provided to any person, by any other person, in relation to support services of business or commerce, in any manner;

10. From a perusal of the above stated statutory definitions it is seen that Business Support Service (BSS) covers in its ambit various activities including infrastructural support services. A perusal of the definition, as extracted above, would show that it does not cover the activities undertaken by the Appellant since it only uplinks and downlinks satellite beams at agreed and desired bandwidth provided by Intelsat and hence such an activity cannot be Infrastructural Support Services. It is also evident from the CBEC Circular dated 28.02.2006 that the Infrastructural Support Service covered under BSS is with reference to only those services which has been outsourced. The Department has presumed that the Appellant has outsourced their activity of uplinking and downlinking signal beams at agreed and desired bandwidth. The said view is not correct since the Appellant has not outsourced their activity of uplinking and downlinking

contents to be received and broadcasted but has purchased the desired bandwidth as they do not possess a satellite of their own to beam such signals. The transaction, therefore, comes within the ambit of 'sale' and is clearly covered by the decision of the Karnataka High Court in **Antrix Corporation(supra),** wherein it has been held that the transaction of providing transponder is one of 'sale' as per Article 366(29)A of the Constitution, and therefore, not amenable to service tax Act under the Finance Act. It is, therefore, clear that the fixed satellite is for broadcasting or beaming of contents and is beyond the scope of Infrastructural Support Service. The demand made in the impugned order is, therefore, not sustainable.

11. The second issue is regarding maintenance of software as per agreement with M/s Aveco and M/s Octopus in respect of 'Maintenance of Software and Upkeep of Hardware' services obtained by the Appellant from the overseas entities, providing Technical Support Service to the Appellant to diagnose and correct any software error and to provide software updates for correction of mistake and maintenance of software during the common upgradation of the software product.

12. The support methodology of imparting technical support services and also onside technical support in case of failure, expenses relating to travelling, accommodation, transport etc., are borne by the Appellant. The show cause notice alleged that such activities of maintenance of software/hardware would be classified under the category of management, maintenance or repair service.

13. Learned Commissioner in the impugned order relied upon the decision of the Tribunal in **SAP India Pvt. Ltd. vs. CCE [2011 (21) STR 303 (Tri-Bang)],** wherein it has been held that services received from M/s Aveco and M/s Octopus were not liable to be classified under management, maintenance or repair service but would be classified as Information Technology Software Services, which is liable to service tax only with effect from 16.05.2008. We find that the show cause notice proposed demand of service tax under the category of Management, Maintenance or Repair Service, and therefore, the confirmation of service tax under the category of 'ITSS' is beyond the scope of show cause notice. The impugned order, thus, has travelled beyond the show cause notice, and therefore, is not sustainable.

14. In regard to the Department Appeal, we find that the Commissioner has rightly dropped the demand pertaining to Maintenance, Management and Repair service pertaining to period prior to 16.05.2008, which is any case would not have come within the sweep of Management, Maintenance or Repair Service. Therefore, the appeal filed by the Department is not sustainable.

15. Accordingly, we allow the appeal filed by the Appellant and dismiss the appeal filed by the Department. The impugned order to the extent it confirms the demand is set aside.

(Pronounced in open court)

(BIJAY KUMAR)
MEMBER (TECHNICAL)

(JUSTICE DILIP GUPTA)
PRESIDENT

Tejo