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

SERVICE TAX APPEAL NO. 50004 OF 2019

[Arising out of Order-in-Appeal No. 64(NG)ST/JPR/2018 dated 08.03.2018 passed by the Commissioner (Appeals), CGST and Central Excise, Jaipur]

M/s. Agarwal Traders **Appellant**

Vs.

Commissioner (Appeals) Central Excise & CGST, Jaipur **Respondent**

Appearance:
Present for the Appellant: None
Present for the Respondent: Shri Harsh Vardhan, Authorised Representative

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing/Decision: **14/01/2025**

FINAL ORDER NO.50074/2025

JUSTICE DILIP GUPTA

This appeal is directed against the order dated 08.03.2018 passed by the Commissioner (Appeals) upholding the order passed by the Deputy Commissioner that confirmed the demand of service tax with penalty.

2. The appellant worked as a dealer of M/s. Vodafone Digilink Ltd. during the period April 2012 to June 2012.

3. The appellant was engaged in the supply and sale of simcard with top-up recharge. A show cause notice dated 11.04.2014 was issued to the appellant alleging that the appellant did not discharge service tax liability on the discount/commission/incentives received from M/s. Vodafone Digilink by way of marketing, selling and distribution of Vodafone products. Accordingly, the appellant was called upon to show cause why service tax demand for the said service should not be recovered with interest and penalty.

4. The appellant filed a reply to the show cause notice and denied the allegations. The Deputy Commissioner, however, by order dated 21.07.2016 confirmed the demand. The appellant filed an appeal before the Commissioner (Appeals) to assail the order. The appeal has been dismissed by the Commissioner (Appeals), by the order dated 08.03.2018. The Commissioner (Appeals) has recorded the following findings:

> "7.5. In view of the above definition, the appellants were involved in promoting or marketing or sale of goods produced or provided by or belonging to the client; or promoting or marketing of service provided by the client; on behalf of the client. **Selling of Sim cards, E-top ups and recharge vouchers are definitely on behalf of M/S Vodafone. I hold that selling of Sim cards E-top ups and recharge vouchers is definitely covered under the scope of Business Auxiliary Service as Commission Agent as they were working on Principal - Agent basis.** It is also seen that Agency in law connotes relationship which exists where one person has an authority or capacity to create legal relationship between a person occupying the position of principal and third parties; that the essential feature of an agent was his power of making the principal answerable to third person viz. enabling the principal to sue third parties directly or render him liable to be sued directly by the third party; that the test of the agency was whether the person purporting to enter into transaction on behalf of the principal i.e. to create, modify or terminate

> contractual obligations between his principal and whom he represents or some third person; that in the absence of agreement, the status of parties would be determined with reference to the circumstances and the conduct of parties; that in the present case, they were definitely acting as agent of the company as regards transactions as stated in above; they had sold the goods to retailers / end customers on behalf of the company; that the Company has to have responsibi.ity over the produets sold by them to their Customers; that they were liable to make payment to the Company at price agreed by them for the products. This income on account of commission attracts Service Tax under the category of 'Business Auxiliary Service' as defined under Section 65 of the Finance Act, 1994 (as amended). hus, comparison of definition of Business auxiliary clause (ii) with that of meaning of Distributors, Marketing and what is discussed above, clearly revealed that the said service provider earned discount for purchase and sale of Re-charge coupons was nothing but commission in the capacity of Promotion or Marketing of service provided by the client i.e. M/s Vodafone. **As per the above, it is amply clear that the services provided by the appellants falls under the category of "Business Auxiliary Services" and liable to pay Service Tax on the commission/incentive received from M/s VDL.**"
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> **(emphasis supplied)**

5. This appeal has, accordingly, been filed to assail the aforesaid order passed by the Commissioner (Appeals).

6. Case has been called out but no one has appeared on behalf of the appellant.

7. Shri Harsh Vardhan, learned authorized representative appearing for the department has very fairly stated that the issue in this appeal has been settled in favour of the appellant by a Division Bench decision of this Tribunal in **Chotey Lal Radhey Shyam** vs. **Commissioner of Central Excise and Service Tax, Lucknow**[1], which decision was upheld by the Allahabad High Court in **Commissioner Central Excise, Lucknow** vs. **M/s.**

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1 2015(11)TMI 979-CESTAT Allahabad

Chotey Lal Radhey Shyam[2]. Learned authorized representative has also pointed out that the issue involved in this appeal has also been decided in favour of the appellant by two subsequent decisions of the Tribunal in **M/s. True Telecom** vs. **CST, Raipur**[3] and **M/s. Ascent Poly Films Pvt Ltd.** vs. **CCE, Delhi**[4]**.**

8. In **Chote Lal Radhey Shyam**, a Division Bench of this Tribunal while examining this issue, held as follows:

> "We have heard both the sides and perused the records. On perusal of the records, we find that, in this case, BSNL had already paid service tax on the sim cards and recharge coupons sold to the franchisee and again demanding service tax from the franchisee would amount to double taxation which is not permissible in law. Secondly, we find that the appellant is only engaged in purchase and sale of sim cards and recharge coupons and his relationship with BSNL is of principal-to-principal basis. The appellant cannot be termed as an agent of BSNL. In view of this, the finding of the learned Commissioner that the appellant is promoting the business of sale or service of BSNL is misconceived. The impugned order is therefore not consistent with law and the catena of judgments delivered by the Tribunal and High Court. The judgment cited above by the learned counsel for the appellant squarely cover the case of the appellant to the fact that the appellant is only engaged in trading activity and does not render any taxable service in the category of 'business auxiliary service'."

9. The appeal filed by the department before the Allahabad High Court to challenge the aforesaid order of the Tribunal was dismissed by judgment dated 30.08.2017 after considering the earlier decisions of the Tribunal as well as decisions of the High Court.

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2 2017(9) TMI 509-Allahabad High Court
3 2017(11)TMI 1653-CESTAT Delhi
4 2018(2) TMI 576-CESTAT New Delhi

10. The subsequent two decisions of the Tribunal in **True Telecom** and **Ascent Poly Films** also rely upon the decision of the Tribunal in **Chote Lal Radhey Shyam.**

11. In view of the aforesaid decisions of the High Court and the Tribunal, it has to be held that the Commissioner (Appeals) was not justified in confirming the demand of service tax on the appellant.

12. The order dated 08.03.2018 passed by the Commissioner (Appeals), therefore, deserves to be set aside and is set aside. The appeal is, accordingly, allowed.

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Archana