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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
SINGLE MEMBER APPEAL BRANCH

Appeal No. ST/696 /2007 – SM[BR] Date 24/11/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S VODAFONE ESSAR DIGILINK LTD.
(FORMERLY KNOWN AS AIRCEL DIGILINK INDIA LTD.) GAURAV TOWERS, MALVIYA NAGAR, JAIPUR, (302017)

M/S VODAFONE ESSAR DIGILINK LTD. Appellant

Vs

C.C.E. JAIPUR I Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 1498 / 2008- **SM[BR]** dated **3.9.2008**

passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
   C.C.E. JAIPUR I
   N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME, JAIPUR 302005.
2. Adv. / Consult SHRI NARSHIMAN ADV.
   B-6 /10, SAFDARJUNG ENCLAVE NEW DELHI -29.

3 S.D.R
~~4 J.C.D.R.~~
5 Bar association. CESTAT. New Delhi
6 M/s. Deeparchi Publications. M-93. Marg. 46. Saket. New Delhi 110017
7 M/s Centax Publictions (P) Ltd., 1512-B. Bhishm Pitamah marg. Opp. ICICI Bank of Defence Colony. New - 3
8 Excise & Customs cases. B-37. Sector -1. NOIDA - 201301 Gautam Budh Nagar. (U.P.)
9 Raghuraman's 44-B. Regal Flat.Shipra Suncity. Indirapuram - 201010.Ghaziabad. DT. U.P.
10 Nidheshak publications. I.P.Estate. new Delhi
11 Taxmann Allied Service Pvt Ltd., 21/35. West Punjabi Bagh. New Delhi - 110026
12 Commercial Laws of India Pvt Ltd Post Bag No. 1033. No.70(Old No. 88). Thyagaraya Road. T. Nagar.Chennai
13 Taxindiaonline.com Pvt.Ltd. B-XI/8183.Vasant Kunj. New Delhi - 110070
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-1
15 Office Copy
16 Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Service Tax Appeal No.696 of 2007-SM (BR)

[Arising out of Order-in-Appeal No.154/GRM/CE/JPR-I/2007 dated 22.08.2007 passed by the Commissioner of Central Excise, Jaipur]

Date of Hearing/ Decision:03.09.08

For approval and signature:

Hon'ble Mr. P.K. Das, Member (Judicial)

1. Whether Press Reporters may be allowed to see CESTAT (Procedure) Rules, 1982.		
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	No.
3. Whether Their Lordships wish to see the fair copy of the Order?	:	
4. Whether Order is to be circulated to the Departmental authorities?	:	Yes

M/s. Vodafone Essar Digilink Ltd. ...Appellants
[Rep. by Shri Narshiman, Advocate]

Vs.

CCE, Jaipur-I ...Respondent
[Rep. by Shri A.K. Rastogi, DR]

CORAM: **Mr. P.K. Das, Member (Judicial)**

Final Order No.1498/08-SM (BR)/Dated:03.09.2008

Per P.K. Das:

The relevant facts of the case, in brief, are that the Appellants are engaged in providing "telephone services" under Finance Act, 1994. It has been alleged that the Appellants availed Credit of Service Tax amounting to Rs.61,473/- on the "port & space charges" in the month of March, 2003, which are not eligible as per Board Circular No.469/2002-ST dated 08.08.2002. Show cause notice dated 18.01.06 was issued proposing demand of tax and imposition of penalty on the ground that they are not eligible to avail credit as per Board Circular. It has also been alleged that the service tax collected by M/s. BSNL has not been deposited in the Government's account and, therefore, the credit availed by the Appellants is not admissible. The Adjudicating Authority confirmed the demand of tax and imposition of penalty of equal amount under Section 76 and 78 of the Finance Act. The Commissioner (Appeals) upheld the Adjudication Order.

2. Ld. Advocate on behalf of the Appellant submits that the Appellant availed the Credit on the basis of invoice issued by the BSNL. No dispute is for genuinety of the said invoices and, therefore, there is no scope to deny the Credit. He further submits that the Adjudicating Authority and the Commissioner (Appeals) have not disputed the deposit of tax by BSNL. He relied upon the decision of the Tribunal in the case of Shriram Refrigeration Industries Ltd. Vs. CCE, Hyderabad reported in 1986 (26) ELT 353 (Tribunal). He also submits that both the authorities below are erroneous to demand the tax at the hands of user of credit. He relied upon the decision of the Hon'ble Supreme Court in the case of

Sarvesh Refractories (P) Ltd. Vs. CCE reported in 2007 (218) ELT 488 (SC).

3. Ld. DR reiterates the findings of the Commissioner (Appeals). He submits that after going through the Board Circular, it appears that the Appellant availed the ir-regular credit and, therefore, it is not admissible to them. He also submits that the Appellant failed to prove that the BSNL paid the tax. He also submits that the Appellants submitted before the Commissioner (Appeals) that if the BSNL has not paid the service tax to the Government, they should not have been penalised.

4. After hearing both the sides and on perusal of the records, ~~we~~ I find that the main allegation against the Appellant that on pursuance of the Board's Circular, no tax is leviable on port and space charges and, therefore, the Appellant is not eligible to avail the credit. In the present case, the Appellant availed Credit on the basis of the invoices issued by BSNL, which was not disputed at suppliers end. So, the contention of the ld. DR that they have availed Credit on the port and space charges, which is contrary to Board Circular is not sustainable. It is revealed from the order of the Commissioner (Appeals) that there is a factual dispute as to whether the BSNL has paid the tax to the Government. It is contended by the Appellant before the Commissioner (Appeals) that the Appellants are not aware as the BSNL has not paid the tax so collected by the Government. In any event, both the authorities below have not given any

findings on this issue. In view of that, the impugned orders are set aside and the matter is remanded back to the Adjudicating Authority. However, Revenue is at liberty to proceed in the matter, if it is found that BSNL has not paid the tax so collected in accordance with law.

Order dictated & pronounced in open court on 3.09.08.

(P.K. Das)
Member (Judicial)

Ckp.