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

Appeal No. ST/213 /2007 - CU[DB] Date 30/01/2009

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

To :
C.C.E. CHANDIGARH (JALLANDHAR)
C.R.BUILDING, PLOT NO. 19, SECTOR 17-C,
CHANDIGARH.
C.C.E. CHANDIGARH (JALLANDHAR) Appellant

Vs

M/S GARAGE TOOLS CORPORATION Respondent

I am directed to transmit herewith a certified copy of **Final order No.** ST/61/09 **CU[DB]** dated 31.12.08 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to :
1. Respondent
   M/S GARAGE TOOLS CORPORATION
   GURDASPUR ROAD, PATHANKOT
2. Adv. / Consult
   MR.SUDHIR MALHOTRA.
   13-R, HUKAM CHAND COLONY, NEAR D.A.V COLLEGE, JALANDHAR
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-15
15. Office Copy
16. Guard file

Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. III

Service Tax Appeal No. 213 of 2007

[Arising out of Order-in-Appeal No. 13/CE/Appl/Jal/2007 dated 23.1.2007 passed by Commissioner (Appeals), Customs & Central Excise, Jalandhar]

For approval and signature:

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

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the 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?
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

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Commissioner of Central Excise Jalandhar — Appellant

Vs.

M/S. Garage Tools Corporation — Respondent

Appearance:

Mr. S.L. Kumar, DR for the Appellants
Mr. Sudhir Malhotra, Advocate for the Respondent

CORAM:

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

Date of Hearing /Decision: 31.12.2008

Final **ORDER NO. ST/61/09**

Per P.K.Das (for the Bench):

1. The Revenue filed this appeal against the order-in-appeal No. 13/CE/Appl/Jal/2007 dated 23.1.07 passed by the Commissioner (Appeals), Jalandhar.

2. Relevant facts of the case, in brief, are that the respondents sold the sim cards as per direction/ instructions of M/s. Spice Communication Pvt. Ltd. and received commission from them for selling of sim cards. Business Auxiliary services provided by commission agents was exempted by Notification No.13/2003-ST. dated 20.6.2003 effective from 1.7.2003. According to the explanation to the said notification 'commission agent' means a person who causes sale or purchase of goods, on behalf of another person for a consideration which is based on the quantum of such sale or purchase. The notification No. 13/04 – ST was amended vide notification No. 8/04-ST dated 9.7.04. The appellant did not pay tax on the commission received from M/s. Spice Communication Ltd. for sale of Sim Cards during the period 1.7.03 to December, 2004. A show cause notice dated 16.5.05 was issued proposing demand of tax for the period 1st July, 2003 to December, 2004 and penalties. Adjudicating authority confirmed the demand of tax and appropriated demand as deposited by them and also imposed penalties. Commissioner (Appeals) modified the adjudication order to the extent demand of tax and penalty and interest for the period 1.7.2003 to 30.6.2004 was set aside. Hence, the Revenue filed this appeal.

3. Learned DR on behalf of the Revenue reiterates ground of appeal. He submits that Notification No. 13/03 extended the benefit in respect of sale or purchase of goods. He submits that in the present case, sale of sim card is not sale of goods but it is a sale of service. He further submits that sale of sim card is incidental to activation device to cellular service being provided by Spice Communication Ltd. He further, submits that Commissioner (Appeals) erroneously proceeded on the basis that sale of sim cards is sale of goods. He relied upon the decision of **Supreme Court in Bharat Sanchar Nigam Ltd. vs. UOI [2006 (2)** STR 161 (SC)]. It is the contention of the learned DR that sim card cannot be used as activation device and therefore it is not sale of goods and not within the purview of exemption notification.

4. Learned advocate on behalf of the respondents reiterates the finding of the Commissioner (Appeals). He submits that there is no dispute of sale of sim cards. He further submits that they were purchasing sim cards from M/s. Spice Communication Ltd. and sold in the market. He also submits that after amendment of notification on 9.7.2004 they were paying tax on the commission. It is his contention that when the sale of sim cards is not disputed, they are well within the purview of notification. It has also contended that Spice Communication Ltd. is paying tax on activation charges.

5. After hearing both the sides and on perusal of the records, we find that the original authority observed that the respondent was commission agent for providing "services" to M/s. Spice

Communication Pvt. Ltd. and not for the "good". There is no dispute that M/s. Spice Communication Pvt. Ltd. paid service tax on activation charges on Sim Cards. It is noted that the respondent sold Sim Cards ~~in carton~~ in the markets on behalf of another person. So the finding of the original authority is not acceptable. The relevant portion of the finding of the Commissioner (Appeals) is reproduced below:

> "If sale of Sim Cards/ Bucks and Quickies is taken as service, this is service for activation and for rendering such service, the cell phone service provider has already discharged service tax. Thus, when service tax on the service provided through Sim Cards/ Bucks and Quickies has already been paid by the cell phone service provider, no further service tax is liable to be paid by the appellants on account of such services, The adjudicating authority, however, held that since appellants are commission agent for the purposes of 'services', they are liable to pay service tax under the category of Business Auxiliary service."

6. The Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd. (Supra) at page 80 observed that what a Sim Card represent is a question of fact. It is also observed that if the Sim Card is not sold by the assessee to the subscribers ~~manufacturers~~ but is merely part of services rendered by the service providers, then a Sim Card cannot be charged separately ~~support tax~~ to sales tax. In the present case, we find that the adjudicating authority had not disputed that Spice Communication Pvt. Ltd. paid the service tax on the activation and there is no dispute about the sale of Sim cards. It appears that Sim Card would be separate object of sale. Notification No. 13/03 (supra) extended the exemption benefit to

sale of goods. Hence, the Commissioner (Appeals) has rightly set aside the ~~element~~ demand of tax for the period from 1.7.03 to 30.6.04.

7. In view of the above discussion, we do not find any justification to interfere with the order of the Commissioner (Appeals). Accordingly, the appeal filed by the Revenue is rejected.

(Dictated & Pronounced in the open Court)

(M. Veeraiyan)
Member(Technical)

(P.K.Das)
Member(Judicial)

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