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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

Date 04/10/2011

Appeal No. ST/400 /2007 ST/125/08- CU[DB]
ST/693, 700/07, ST/557/08,186/08

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

To :
IDEA MOBILE COMMUNICATION LTD — ST/400/07, St/125/08
ANAND BANQUET HALL, DELHI ROAD, SONEPAT.

IDEA MOBILE COMMUNICATION LTD Appellant
Vs
Respondent
C.E.E. DELHI I

I am directed to transmit herewith a certified copy of **Final order No.ST/529-534/ 2011 CU[DB]** dated 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
C.C.E. DELHI I
C.R. BUILDING, I.P. ESTATE, NEW
DELHI 110002

2. Adv. / Consult
MR.V. LAXMIKUMARAN
B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file
14. CCE Rohtak. SCO No-6 Sector-I Rohtak

Assistant Registrar
(Customs Appeal Branch)

M/S AJMER ZILA EX-SERVISE MAN WELFARE CO-OPERATIVE **ST/220/2005**
PLOT NO. 4, MISSION COMPOUND, CIRCULAR ROAD, AJMER (RAJ)

MR.K.K ANAND
A-5,BASEMENT,LAJPAT NAGAR-III NEW DELHI-24

SIKAR EX-SERVICEMEN WELFARE CO-OPERATIVE SOCIETY LTD ST/1/06
SIKAR (RAJASTHAN) SUPER TOWER, BEHIND S.K. HOSPITAL,
SIKAR (RAJASTHAN

M/S BHARATPUR - DHOLPUR PURVA SAINIK KALYAN **ST/65, 82/06**
3/475, MATHURA GATE, BEHIND NAGAR PARISHAD,
BHARATPUR (Raj)

M/S DESERT HAWKS EX-SERVICEMAN WELFARE COOPERATIVE ST/394/07
SOCIETY LTD.
B-78, VINOBHA BHAVE NAGAR, NEAR VAISHALI NAGAR, JAIPUR

INDIAN EX-SERVICEMEN WELFARE CO-OPERATIVE ST/451/07
SOCIETY LTD. JAIPUR
22, K-5, SCHEME, KAHTIPURA SIRSI ROAD, JAIPUR

M/S POORVA SAINIK BHAU UDESHYA SAHAKARI SAMITI LTD ST/419/07
NEAR KHARI BAWARI, JHALAWAR

M/S EX-SERVICEMEN SECURITY SERVICES ST/680/07
SHOP NO 5, LEELA BHAWAN, PATIALA

M/S ZILA PURVA SAINIK BAHUDESHIYA SAHKARI SAMITI LTD ST/695/07
1-KA-16, DADABARI, KOTA(RAJ)

M/S PURVA SAINIK WELFARE CO-OPERATIVE SOCIETY LTD ST/490/08
SHOP NO.17, SIRSI ROAD,KHATIPURA, JAI BHAWANI
COLONY, JAIPUR.

C.C.E. JAIPUR I
N.C.R.BUILDING, STATUE CIRCLE,
"C" SCHEME, JAIPUR 302005.

C.C.E JAIPUR-II
N.C.R.BUILDING, STATUE CIRCLE,
"C" SCHEME, JAIPUR 302005.

C.C.E JAIPUR
N.C.R.BUILDING, STATUE CIRCLE,
"C" SCHEME, JAIPUR 302005.

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
DIVISION BENCH

Service Tax Appeal No.400 of 2007
Service Tax Appeal No.125 of 2008

(Arising out of Order-in-Appeal No.o4/ST/RTK/2007 dt.09.4.07 passed by the CCE (A), New Delhi)
(Arising out of Order-in-Original No.25/Commr/SU/07/ST dt.30.11.07 passed by the CCE, Rohtak)

Date of Hearing/Decision: 21.09.2011

For approval and signature:
Hon'ble Mrs.Archana Wadhwa, Member (Judicial)
Hon'ble Mr.Rakesh Kumar, Member (Technical)

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

M/s.Idea Mobile Communications Ltd. Appellant
Vs.
CCE, New Delhi/Rohtak Respondent

Service Tax Appeal No.693 of 2007

(Arising out of Order-in-Appeal No.181/CE/CHD/2007 dt.31.06.07 passed by the CCE (A), Chandigarh)

M/s.Bharti Airtel Ltd. Appellant
Vs.
CCE, Chandigarh Respondent

Service Tax Appeal No.700 of 2007

(Arising out of Order-in-Appeal No.276/CE/Appl/Jal/07 dt.31.08.07 passed by the CCE (A), Chandigarh)

CCE, Jalandhar Appellant
Vs.
M/s.Bahrain Telcom Respondent

Service Tax Appeal No.557 of 2008

(Arising out of OIA No.04/Commissioner/LKO/CX/2008 dt.15.05.08 passed by the CCE (A), Lucknow)

M/s.Bharti Airtel Ltd. Appellant
Vs.
CCE, Lucknow Respondent

Service Tax Appeal No.186 of 2008

(Arising out of OIA No.IND-I/33/2008 dt.14.02.08 passed by the CCE (A), Indore)

CCE, Indore Appellant
Vs.
M/s.Bharti Airtel Ltd. Respondent

Present for the Appellant: Shri B.L.Narsimhan, Advocate with Shri Udai Aditya Banerjee, Advocate and vice versa
Present for the Respondent: Shri B.L.Soni, SDR and vice versa

Coram: Hon'ble Mrs.Archana Wadhwa, Member (Judicial)
Hon'ble Mr.Rakesh Kumar, Member (Technical)

Final **ORDER NO.** ST/529-534/11

PER: ARCHANA WADHWA

All the appeals are being disposed of by a common order as the issue involved is identical in all the appeals.

2. As per facts on records, the appellants are providers of cellular telephone services which are covered by the definition under section 65 (74) of chapter V of Finance Act, 1994. The dispute in the present appeals relates to the issue is as to whether the value of SIM cards is required to be included in the value of services being provided by the appellants.

3. Both sides agree that the issue is no more res integra and stands settled by the recent decision in the same appellants' case reported as Idea Mobile Communications Ltd. vs. CCE & C, Cochin-2011-TIOL-71-SC-ST. It stands held by the Apex Court that the value of SIM cards forms part of the activation charges as no activation is possible without a valid functioning of SIM card and the value of the taxable service is to be calculated on the gross total amount received by the operator from the subscribers. As such, the appeals are required to be rejected on merits.

4. Learned Advocates, Shri B.L.Narsimhan and Shri Udai Aditya Banerjee appearing for the appellants submits that the said issue was subject matter of dispute before various judicial and quasi-judicial authorities. The issue decided in their own case was in favour of the appellants. The same was reversed by the Hon'ble Kerala ~~Karnataka~~ High Court on an appeal filed by the Revenue, which stands reported as CCE, Cochin vs. Idea Mobile Communication Ltd.-2010 (19) STR 18 (Ker.). The said decision of Kerala ~~Karnataka~~ High Court reversed the decision of the Tribunal, which further stands upheld by the Hon'ble Supreme Court. He, however, submits that the Hon'ble Kerala ~~Karnataka~~ High Court while accepting the Revenue's stand has observed that "*Since the dispute was bonafide and it is settled based on the observations of the Supreme Court, we feel levy of penalty under section 73 of the Finance Act, 1994 was not tenable. While upholding the demand of service tax on value of SIM cards and the*

interest thereon, we hold that no penalty could be levied on the respondent under section 73 of the Act."

5. Based upon the observations of Hon'ble ~~Karnataka~~ Kerala High Court, learned Advocate submits that inasmuch the Tribunal's order was in favour of the assessee, there could be no question of malafide on their part so as to invoke the longer period of limitation. He also draws our attention to various other decision of the Tribunal laying down that the value of SIM cards is not required to be included in the value of services. He places reliance on the Tribunal's decision in the case of RPG Cellular Services Ltd. vs. CCE, Chennai-2008 (10) STR 298 (Tri.) as also on the decision in the case of BPL Mobile Communication Ltd. Vs. CCE, Mumbai-2007 (7) STR 440 (Mum). The said decision of the Tribunal in the case of BPL Mobile Communication Ltd. stands upheld by the Hon'ble Bombay High Court, when the appeal filed by the Revenue was rejected as reported in 2008 (9) STR 349 (Bom.). Hon'ble Bombay High Court has observed that the Tribunal's order observing that the issue as to the levy of service tax in respect of the sale of SIM card is not free from doubt, the penalty is not imposable, is correct.

Learned Advocate also draws our attention to the decision of the Apex Court in the case of Continental Foundation Joint Venture vs. CCE, Chandigarh-I-2007 (216) ELT 177 (SC) laying down that mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty and incorrect statement cannot be equated with wilful mis-statement, held that the longer period of limitation was not available to the Revenue. It stands observed that on account of judgement of the Tribunal and various circulars operating at the relevant time, there was scope on the part of the assessee for entertaining the doubt about the view to be taken, extend~~ing~~ed period in such case cannot be invoked.

As such, he pleads that the demands beyond the normal period of limitation ~~are~~ be set aside alongwith setting aside imposition of penalties.

6. As against the above, learned SDR appearing for the Revenue draws our attention to the findings of the lower authorities, holding against the appellants, while dealing with their submission that they have been filing regular returns, depositing tax in time, with every detail given to the Revenue. The adjudicating authority has observed that though it is correct that they were filing regular returns but the fact that they were not including the value of the sale of SIM card in gross taxable value, ~~It~~ it came ~~in~~ to the knowledge of the department only when the audit of the company was conducted and detailed investigations made. As such, the said fact was not brought to the department by the appellants themselves, the same amounts to suppression, thus, justifying invocation of longer period of limitation.

7. We have considered the submissions made by both sides. As agreed by both sides that the issue involved is to be decided in the present appeals is as to whether the extended period of limitation is available to the Revenue for confirming the demand of duty.

8. Admittedly earlier decision of the Tribunal, in the appellants' own case, as also in the other cases were in favour of the assessee. The said decisions were reversed by the Hon'ble Kerala High Court. It was also observed in the Hon'ble Kerala High Court's decision that since the issue is of bonafide interpretation and as such invocation of penal provision was not justified. We note that the grounds for penal provision and for invoking longer period of limitation are identical. As admittedly earlier decisions were in favour of the assessee, it cannot be held that there was ~~no~~ any malafide intent on the part of the assessee.

9. The Hon'ble Supreme Court in the case of Jaiprakash industries Ltd. vs. CCE, Chandigarh reported in [2002 (146) ELT 481 (SC) has observed that when there is a bonafide doubt as regards the non-excisability of the goods due to divergent views of the High Courts, extended period of five years cannot be invoked. It further stands observed that mere failure or negligence in not taking licence or not paying duty is not sufficient to invoke extended period. Further, the Hon'ble Supreme Court in the case of Cosmic Dye Chemical vs. CCE, Bombay reported in (1995) 6 Supreme Court Cases 117 has observed that malafide intention is an essential element for invokation of longer period of limitation. There being different views of High Courts expressing conflicting opinion on the point of dispute are sufficient for any person to entertain a bonafide belief. In the circumstances, mis-statement or suppression of facts, if any, cannot said to be wilful.

10. We note that the reliance by the learned SDR on the Hon'ble Gujarat Court's decision in the case of Neminath Fabrics reported as 2010 (256) ELT 369 (Guj.) is not correct inasmuch as the issue involved in that case as also in the case of decision of the Apex Court in Mehta & Co. reported as2011 (264) ELT 481 (SC), was on the issue as to whether the period of 5 years would be available to the revenue from the date of search of the factory, when the officers get the knowledge about the clandestine activities of the assessees.

11. By applying the ratio of law declared in the above decisions, we find that since the earlier decisions of the Tribunal were in favour of the assessee, it has to be held that there was bonafide doubt about the non inclusion of the cost of SIM card in the value of services. If that be so, no malafide can be attributable to the appellant so as to invoke the extended period of limitation.

12. In view of foregoing discussion, We hold that the demand raised beyond the period of limitation is barred by limitation. The lower authorities are accordingly directed to re-quantify the demand falling within the limitation period. Further, following the Hon'ble Kerala High Court's decision in the appellants' own case, we hold that no penalty is imposable upon the appellants. The same is accordingly set aside. All the appeals are disposed of in the above manners.

(Operative part of the order already pronounced in the court)

(ARCHANA WADHWA)
MEMBER (JUDICIAL)

(RAKESH KUMAR)
MEMBER (TECHNICAL)

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