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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/246 /2008 - CU[DB] Date **12/07/2011**

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

To :
VODAFONE ESSAR DIGILINK LTD
GAURAV TOWERS, MALVIYA NAGAR, JAIPUR.

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.ST/272/ 2011 CU[DB]** dated 28.06.11 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. JAIPUR I
N.C.R.BUILDING, STATUE
CIRCLE, "C" SCHEME, JAIPUR
302005.

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

Assistant Registrar
(Customs Appeal Branch)

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

COURT NO. II

Service Tax Appeal No. 246 of 2008

[Arising out of Order-in-Appeal No. 3(RKS)ST/JPR-I/2008 dated 15th January, 2008 passed by the Commissioner of Central Excise (Appeals), Jaipur].

Date of Hearing/decision: 1st June, 2011

For approval and signature:

Hon'ble Shri D.N. Panda, Judicial Member;
Hon'ble Shri Sahab Singh, Technical Member

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?	

M/s. Vodafone Essar Digilink Ltd., Appellant

Vs.

CCE, Jaipur-I Respondent

Present for the Appellant : Shri S. Vasudevan & Shri Krishan Mohan, Advocates
Present for the Respondent : Shri Sumit Kumar, D.R.

Coram: Hon'ble Shri D.N. Panda, Judicial Member
Hon'ble Shri Sahab Singh, Technical Member

FINAL ORDER NO. ST/272/11 **DATED** 28.6.11

Per D.N. Panda:

The dispute in this appeal is whether the service provided by the appellant as a visiting network service provider shall be treated as exempt service and Cenvat credit shall be limited to 35% and whether non-disclosure of such fact in the return shall amount to suppression?

2. Learned Counsel is very fair to submit that the issue of taxability in the case of visiting network service provider has been settled by the Tribunal in the case of Idea Cellular Ltd. vs. CCE, Rohtak - 2009 (16) STR 712 (Tri.-Del.). But his further submission is that Cenvat credit admissible whether shall be worked out in respect of each return period or shall be worked out for whole year tax liability is to be decided. He also submit that period under taxation was May, 2003 to August, 2004 and show cause notice was issued on 21.8.2006. When the appellant filed respective returns disclosing about the method of working of the appellant to the department the proceeding was time barred. He also argued that since there is no liability no penalty can be imposed. He relies on Circular No. 22/2/97 dated 3.9.97, Trade notice No. 2/99-ST dated 21.6.90, and Service Tax Circular No. 90/1/2007-ST dated 3.1.2007 to submit that the department's clarification is that roaming telecom service is not liable to be taxed in the hand of visiting network service provider for the reason that home

network provider is liable to pay service tax in respect of that service.

3. Per contra, learned D.R. submits that when consideration is received for the service provided by the appellant as visiting network service provider that was in relation to taxable service and was telecom service. Once the service provided is telecom service and taxable service but that has not suffered service tax in the hand of the appellant by virtue of service tax exemption granted that becomes exempted service for which Tribunal has already decided the controversy in question in favour of the Revenue. The appellant, no doubt, had filed returns for the respective periods. When the appellant had claimed set off of input credit against each return filed and that is verifiable from page 23 onward of appeal paper book that clearly shows that while credit was enjoyed by the appellant in respect of each return period they had deprived Revenue to collect its legitimate dues for the relevant period. Return nowhere disclosed that the service provided was exempted service. But it had claimed entire service credit for set off. Had entire fact been disclosed, bona fide would have come up for consideration. Section 73(1) specifically covers the circumstances which states that when contravention of law was made by contravener for unjust enrichment, such act amounts to suppression. Therefore, while granting Cenvat credit to the extent permissible in respect of each return

period, Revenue is entitled to levy penalty for the loss it has suffered.

4. Heard both sides and perused the record.

5. So far as restriction of Cenvat credit to the extent of 35% is concerned that no more is in dispute by virtue of decision of the Tribunal in Idea Cellular Ltd. case – 2009 (16) STR 712 (Tri.-Del). Visiting network service is exempted service for which admissibility of Cenvat credit shall be limited to 35% in respect of each return period when Cenvat credit is claimed for set off. Accordingly, liability of the appellant is to be recalculated giving set off on Cenvat credit limiting to 35% in respect of each return period. The adjudication accordingly shall end in re-computing service tax demand.

6. We limit demand in adjudication to this extent.

7. So far as levy of penalty is concerned the case of the appellant is that Cenvat credit of a higher amount was unduly claimed. Sample copy of the return is available in appeal folder at page 23 of the paper book, That nowhere discloses bona fide of the appellant. Had the appellant disclosed that it was under bonafide belief that service provided by the appellants as visiting network service provider was exempt and not taxable, the appellant would have clearly guided the department to understand its claim on set off Cenvat credit. Failure to make such disclosure in return or submitting entire fact by any letter accompanying its return appears to be a case of willful suppression. Suppression does not vanish by mere passage of time to issue of show cause notice and contravention of law gets no immunity from penal consequences. Suppression corroborated by an untrue declaration in the return filed calls for levy of penalty. When

the return contains a declaration as to the self assessment particulars stating that the assessee had paid service tax correctly in terms of provisions of the Act and Rules made thereunder such declaration becomes faulty in absence of bona fide statement either on the return or made through a letter accompanying the return. Once the appellant has claimed that service tax has been paid in accordance with the law and that is not paid, that imputes the appellant to the charge. Such view brings harmony in construction of law and for effective implementation thereof in respect of self assessment procedure. The act of false declaration can be remedied by levy of penalty. Thus penalty levied under Section 76 is confirmed and so far as penalty under Section 78 is concerned that shall be limited to the quantum of tax payable upon re-computation as directed aforesaid. However, the authority shall examine whether concession in penalty is permissible under second proviso to section 78 of the Act. Interest as required under Section 75 shall be payable on the tax due.

8. Appeal is allowed to the limited extent as aforesaid.

(Dictated & pronounced in the Open Court.)

(D.N. PANDA)
JUDICIAL MEMBER

(SAHAB SINGH)
TECHNICAL MEMBER

RK