

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

Appeal No. ST/655 /2008 - CU[DB]

Date 25/05/2012

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

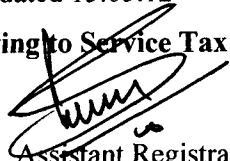
To :  
M/S BHARTI AIRTEL LIMITED.,  
D-184, OKHLA INDUSTRIAL AREA, PHASE-I, NEW  
DELHI-110002.  
**M/S BHARTI AIRTEL LIMITED.,**

Appellant

Vs  
Respondent

**C.S.T. DELHI**

I am directed to transmit herewith a certified copy of **Final order No.ST/A/398/ 2012 CU[DB]** dated 15.05.12  
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.S.T. DELHI**

17-B, I.P. ESTATE, IAEA HOUSE,  
NEW DELHI.

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 Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi-3

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

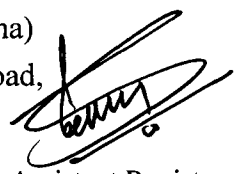
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road,  
Ahmedabad-15

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)

**IN THE CUSTOMS, EXCISE & SERVICE TAX  
APPELLATE TRIBUNAL  
West Block No. 2, R.K. Puram, New Delhi – 110 066.**

**Date of Hearing : 15.5.2012**

**Service Tax Appeal No. 655 of 2008**

[Arising out of the Order-in-Original No. 60/KVG/2008 dated 4.7.2008  
passed by the Commissioner of Service Tax, New Delhi]

For Approval & Signature :

**Hon'ble Ms. Archana Wadhwa, Member (Judicial)**

**Hon'ble Shri Mathew John, Member (Technical)**

|    |                                                                                                                                      |      |
|----|--------------------------------------------------------------------------------------------------------------------------------------|------|
| 1. | Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?         | Yes  |
| 2. | Whether it would 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?                                                                      | Seen |
| 4. | Whether order is to be circulated to the Department Authorities?                                                                     | No   |

M/s Bharti Airtel Limited

Appellants

Vs.

CCE, Delhi

Respondent

**Appearance:**

Appeared for Appellant : Shri B.L. Narasimhan, Advocate

Appeared for Respondent : Shri Amrish Jain, A.R.

CORAM: Hon'ble Ms. Archana Wadhwa, Member (Judicial)

Hon'ble Shri Mathew John, Member (Technical)

Final Order No. ST/A/398/12-CW dated.....

**Per Mathew John :**

The Appellants are engaged in the business of providing  
mobile telephone services. During 19.12.97 to 31.3.2000, they

provided pre-paid and post-paid connections to subscribers. In the case of post paid connection the bills were raised for the sale of SIM cards and sales tax was paid on the value of SIM cards and separately another bills were raised for activation charges on which service tax was paid. In the case of pre-paid connections the same type of transactions were done through their agents. Sales tax was paid on the value of SIM cards and on such value service tax was not paid.

2. Revenue was of the view that the sale of SIM card was necessary for providing the service that the appellants were providing and without the sale of such SIM cards no service could be rendered. Revenue was of the view that the essential nature of their activity was that of a service and not that of sale of SIM cards. Therefore the Appellants should have paid service tax on the value billed to the customers including the value for sale of SIM cards. On such reasoning, a Show Cause Notice was issued demanding service tax not paid during the period 19.12.1997 to 31.3.2000. The Show Cause Notice was adjudicated by demanding service tax amounting to Rs.1,20,02,456/- along with interest and also imposing penalty of Rs.100/- per day under Section 76 of the Act and Rs.1,20,02,456/- under Section 78 of the Finance Act 1994.

Aggrieved by the order, the Appellants have filed this appeal before the Tribunal. The Appellants submit that in this case Show Cause Notice was issued on 18.12.2002 and thus the demand is beyond the normal period of limitation.

3. He also relies on the decision of Apex Court in the case of **Bharat Sanchar Nigam Ltd. & Anr. Vs. Union of India – 2006 (3) SCC 1** and **Imagic Creative Pvt. Ltd. Vs. CCE – 2008 (9) STR 337 (SC)** which decisions laid down that the Centre and State should be within their limits to charge service tax and sales tax and not both at the same time. They argue that the fact that the SIM cards were sold at a price higher than the price for import cannot be a reason to conclude that price of SIM card would be part of the service provided.

4. The ld. A.R. for Revenue submits that the question whether value of SIM cards will form part of the value of service rendered has been decided by Kerala High Court in **CCE Vs. Idea Mobile Communication – 2010 (19) STR 18 (Ker.)** and affirmed by Supreme Court as reported at **Idea Mobile Communication Ltd. Vs. CCE – 2010 (20) STR 577-SC**. He points out the appellants were never disclosing to the department the fact that they were charging separately for

value of SIM card from customer and were not paying service tax on it and therefore the extended period of 5 years could be invoked for issuing the demand and thus the demand issued and confirmed is legal and proper.

5. We find that the basic issue involved in the dispute is one of legal interpretation of constitutional provisions. The Hon'ble Apex Court itself formulated its interpretation after a series of decisions on the issue. There has been genuine doubt whether value of SIM cards would form value of service rendered we quote para 80, 82 and 83 of the decision of the Apex Court in the case of **Bharat Sanchar Nigam Ltd. Vs. UOI – 2006 (2) STR 161 (SC)** below :-

80. It is not possible for this Court to opine finally on the issue. What a SIM card represents is ultimately a question of fact as has been correctly submitted by the States. In determining the issue, however the Assessing Authorities will have to keep in mind the following principles: If the SIM Card is not sold by the assessee to the subscribers but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sales tax. It would depend ultimately upon the intention of the parties. If the parties intended that the SIM card would be a separate object of sale, it would be open to the Sales Tax Authorities to levy sales tax thereon. There is insufficient material on the basis of which we can reach a decision. However we emphasise that if the sale of a SIM card is merely incidental to the service being provided and only facilitates the identification of the subscribers, their credit and other details, it would not be assessable to sales tax. In our opinion the High Court ought not to have finally determined the issue. In any event, the High Court erred in including the cost of the service in the value of the SIM card by relying on the aspects doctrine. That doctrine merely deals with legislative competence. As has been succinctly stated in *Federation of Hotel & Restaurant Association of India v. Union of India* (1989) 3 SCC 634 - "subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power. They might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is

overlapping does not detract from the distinctiveness of the aspects". No one denies the legislative competence of States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction.

82. For the same reason the Centre cannot include the value of the SIM cards, if they are found ultimately to be goods, in the cost of the service. As was held by us in *Gujarat Ambuja Cements Ltd. v. Union of India* (2005) 4 SCC 214, 228.

"This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking, a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject-matter which a fair reading of the entry does not cover. If in substance, the statute is not referable to a field given to the State, the Court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field."

83. We will therefore have to allow the appeals filed by BPL in Civil Appeal Nos. 3329-30 of 2002 and Escotel in Civil Appeal No. 2408 of 2002 and remand the matter to the Sales Tax Authorities concerned for determination of the issue relating to SIM Cards in the light of the observations contained in this judgment.

6. Considering the nature of dispute as detailed above, we are of the view that this is not a case where the extended period of time could have been invoked for demanding service tax not paid on value of SIM cards sold. While giving this decision we note that the period of demand in this case is Dec. 1997 to March 2000 when the law involved in the matter was still evolving. We also note that in 2003, the GOI issued exemption notification No. 12/2003-ST for value of goods sold in the course of providing service. So our decision in this matter is based on an overall appreciation of the evolution of law.

7. Thus the appeal is allowed by holding that the impugned demands are time-barred.

(Pronounced in Court)

(Archana Wadhwa)  
Member (Judicial)

(Mathew John)  
Member (Technical)

RM